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In the Supreme Court of the United States

J.T. YARNELL, in his official capacity as Chief Engineer of the Missouri Department of Transportation, ET AL.,
Petitioners,

v.

MICHAEL CUFFLEY and the KNIGHTS OF THE KU KLUX KLAN,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Missouri's Adopt-A-Highway program permits volunteers to engage in highway maintenance, a legal obligation of the State traditionally performed by state employees, by picking up litter along a designated stretch of highway. The State provides equipment, safety training, and assistance to volunteers, and erects signs acknowledging their participation. Missouri rejected an application to the program submitted by the Knights of the Ku Klux Klan. The questions presented are:

1. Whether the First Amendment permits Missouri to deny the Klan's application because the Klan's participation in the Adopt-A-Highway program would constitute state action, making the State responsible for the Klan's discriminatory practices.

2. Whether the First Amendment permits Missouri to deny the Klan's application because the State would violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d), if it permitted the Klan to participate in the Adopt-A-Highway program.

3. Whether the expressive activity involved in the Adopt-A-Highway program is that of the State, so that it is permissible for the State to make distinctions regarding that activity on the basis of viewpoint.

RULE 14.1(b) STATEMENT

Pursuant to Rule 14.1(b), petitioners state that, in addtion to J.T. Yarnell, in his official capacity as Chief Engineer of the Missouri Department of Transportation, petitioners here include Ed Hassinger, in his official capacity as District Engineer of the Missouri Department of Transportation, St. Louis Metro District; Stacey Ann Armstrong, in her official capacity as Roadside Management Supervisor of the Missouri Highway and Transportation Department; S. Lee Kling, Edward D. Douglas, William E. Gladden, Ollie W. Gates, W.L. Orscheln, and Marjorie B. Schramm, in their official capacities as commissioners of the Missouri Highway and Transportation Commission. Appellants in the court below were Joe Mickes, in his official capacity as Chief Engineer of the Missouri Department of Transportation; Stephen Knobbe, in his official capacity as District Engineer of the Missouri Department of Transportation, St. Louis Metro District; Stacey Ann Armstrong, in her official capacity as Roadside Management Supervisor of the Missouri Highway and Transportation Department; Thomas M. Boland, Robert E. Jones, Edward D. Douglas, S. Lee Kling, James W. Gamble, and William E. Gladden, in their official capacities as commissioners of the Missouri Highway and Transportation Commission. Current office-holders have been substituted for Joe Mickes, Stephen Knobbe, Thomas M. Boland, Robert E. Jones, and James W. Gamble, who no longer hold the official positions indicated.

Respondents here (appellees in the court below) are Michael Cuffley and the Knights of the Ku Klux Klan.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully ask this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 208 F.3d 702. App., *infra*, 1a-17a. The opinion of the District Court is reported at 44 F. Supp.2d 1023. App., *infra*, 18a-30a.

JURISDICTION

The Eighth Circuit rendered its decision on March 31, 2000, and denied petitioner's timely petition for rehearing on May 22, 2000. App., *infra*, 31a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *."

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, provides in relevant part: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, or denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (1988), codified in relevant part at 42 U.S.C. § 2000d-4a(1)(A), provides: "The term 'program or activity' * * * mean[s] all of the operations of[] a department, agency, special purpose district, or other instrumentality of a State or of a local government * * * any part of which is extended Federal financial assistance."

STATEMENT

The court of appeals' decision in this case requires Missouri both to permit the Ku Klux Klan to participate in the maintenance of the State's highways and to erect a sign acknowledging the Klan's role in performing that traditional state function. The analysis that led the court to that bizarre result departs from this Court's holdings regarding state action; misreads the language and history of Title VI of the Civil Rights Act of 1964; disregards the State's interest in using its *own* speech to disassociate itself from the Klan's policy of racial discrimination; and contributes to considerable confusion in the lower courts about these important areas of law. Further review therefore is warranted.

A. The Missouri Highway and Transportation Commission

The Missouri Highway and Transportation Commission ("MHTC") is a state agency that is "empowered and directed to take whatever steps may be necessary * * * to provide for the proper maintenance" of all state and federal highways within Missouri. MO. ANN. STAT. §§ 227.020, 227.030, 227.210(1); MO. CONST. art. 4, § 29. It has exclusive responsibility for maintenance of highway rights-of-way, even if fee ownership of the land belongs to a private landowner. See *Mispagel* v. *Missouri Hwy. & Transp. Comm'n*, 785 S.W.2d 279, 282 (Mo. 1990); *Martin* v. *Missouri Hwy. & Transp. Dep't*, 981 S.W.2d 577, 580-581 (Mo. Ct. App. 1998); *Summitt* v. *Roberts*, 903 S.W.2d 631, 635 (Mo. Ct. App. 1995). To carry out its responsibilities, the MHTC is authorized to "limit access to, from and across state highways where the public interest and safety may require." MO. CONST. art. 4, § 29.

Notably, the MHTC's exclusive control over highways extends to signs posted on highway rights-of-way. MO. ANN. STAT. §§ 226.500, 226.510(3); *Missouri Outdoor Adver. Ass'n, Inc.* v. *Missouri Hwy. & Transp. Comm'n*, 826 S.W.2d 342, 344-345 (Mo. 1992). With exceptions not relevant here, the

only signs permitted within 660 feet of the highway right-of-way are "[d]irectional and other official signs" posted by the MHTC. MO. ANN. STAT. §§ 226.520, 226.525, 226.527(1), 226.550(1)-(2).

B. The Adopt-A-Highway Program

The MHTC's Adopt-A-Highway program, begun in 1987, is intended "to increase public awareness of the environmental needs along Missouri's highways and to provide volunteer community support for anti-litter and highway beautification programs." MO. CODE REGS., tit. 7, § 10-14.010(1); see also Missouri Dep't of Transp., *Info for You — Programs — Adopt-A-Highway* (last visited Aug. 14, 2000) <http://www.modot.state.mo.us/info/adopt/facts.htm>. When they participate in the program, organizations, clubs, businesses, and individuals volunteer to pick up litter along a designated stretch of highway. See *Missouri Hwy. & Transp. Comm'n* v. *Cuffley*, 927 F. Supp. 1248, 1252 (E.D. Mo. 1996) ("*Cuffley I*"). The MHTC provides equipment to the volunteers and erects a sign acknowledging their participation. See *ibid.* Missouri saves approximately $1.4 million per year by having Adopt-A-Highway volunteers rather than paid state employees perform roadway cleanup. See 25 Mo. Reg. 635, 636 (Mar. 15, 2000).

Prior to 1995, there were no formal written regulations governing the Adopt-A-Highway program. See *Cuffley I*, 927 F. Supp. at 1252. Even before the adoption of such regulations, however, the MHTC retained the right to review applications on a case-by-case basis and to reject applicants that the MHTC found unacceptable. See *ibid.* The MHTC had given special scrutiny to several groups prior to 1994, and also had asked a group named "Truckin' Seduction" to reconsider its application on the grounds that the group's name was sexually suggestive; ultimately, the group withdrew its application. See *ibid.*

In 1995, the MHTC adopted regulatory guidelines for the Adopt-A-Highway program. See MO. CODE REGS., tit. 7, § 10-14.010 *et seq.* Among other things, the MHTC's regulations

make clear that the program is "not intended as a means of providing a public forum for the participants to use in promoting name recognition or political causes." *Id.* § 10-14.030(1); see also 25 Mo. Reg. at 636 ("Missouri highway right-of-way is not a public forum" and the MHTC's Adopt-A-Highway program "is not intended as a means of providing a public forum for the participants to use in promoting name recognition or political causes"). Under the regulations, the MHTC retains "sole responsibility" for determining whether an applicant is permitted to participate in the program. MO. CODE REGS., tit. 7, § 10-14.030(2).[1]

The 1995 regulations also spell out the responsibilities of volunteers and the MHTC under the program. Participants are required to comply with certain safety requirements and other terms and conditions set by the MHTC. MO. CODE REGS., tit. 7, § 10-14.040(2)(A)-(E), (J)-(L). Participants promise to adopt their location for at least three years, to collect litter at least four times per year, and to adopt a minimum length of highway. See

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[1] Although a broad range of prospective applicants are eligible to apply, including "civic and nonprofit organizations, commercial and private enterprises and individuals" (*id.* § 10-14.030(1)), the 1995 regulations impose several substantive restrictions on participation. The MHTC may reject an application if, "in its opinion, granting the request would jeopardize the program, be counterproductive to its purpose or have undesirable results such as increased litter, vandalism or sign theft." *Id.* § 10-14.030(2)(A). Any applicant that fails to "adhere to the restrictions of all state and federal nondiscrimination laws" is disqualified from participation. *Id.* § 10-14.030(2)(B). Finally, "[a]pplicants with a history of unlawfully violent or criminal behavior will be prohibited from participation in the program." *Id.* § 10-14.030(2)(C). The MHTC recently noted that participation of groups convicted of violent criminal activity, including hate crimes, in the Adopt-A-Highway program had resulted in vandalism and theft of state property on state highway rights-of-way, creating "an immediate danger to the health, safety and welfare" of Missouri citizens. 25 Mo. Reg. 629, 629 (Mar. 15, 2000).

id. § 10-14.040(2)(F)-(H). The MHTC, in turn, pr vides trash bags and safety equipment to participants and removes filled trash bags from the highway following the litter pick-up. See *id.* § 10-14.040(3). The MHTC also typically acknowledges volunteers' participation by erecting a sign at the beginning and end of each designated portion of the highway that states the name of the group assigned to that location. See *id.* § 10-14.040(3)(B). "The erection of a sign is not a requirement for participation in the program," however, and the MHTC retains "sole discretion" to "refuse to erect a sign" acknowledging a volunteer's participation. See *id.* § 10-14.050(3). It also retains sole control over the content of the sign: the MHTC determines the size, color, location, and text of the sign, which may not include symbols, logos, advertising, and other statements, and it prohibits "wording which is obscene or profane, or implies an obscenity or profanity." See *id.* § 10-14.050(1)-(2).

C. The Ku Klux Klan's Application To Participate In the MHTC's Adopt-A-Highway Program

On May 31, 1994, Michael Cuffley, the highest-ranking official in the Missouri organization of the Knights of the Ku Klux Klan, filed an application to participate in the Adopt-A-Highway program on behalf of the Klan. See *Cuffley I*, 927 F. Supp. at 1052-1053.[2] The Klan requested a half-mile stretch of Interstate 55 on one of the routes used to bus African-American students to county schools as part of court-ordered desegregation efforts. See *id.* at 1052-1053. Rather than accept or reject the application, the MHTC filed suit against Cuffley and the

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[2] "Federal courts have taken judicial notice of the history of the Klan groups and the history of violence, racial hatred and bigotry of these groups." *Cuffley I*, 927 F. Supp. at 1253 (citing cases). Membership in the Klan is limited to "Aryans"; the Klan excludes all persons who are of Jewish, African-American, Mexican, or Asian "descent," who are married to someone who is Jewish, Asian, Native American, or African-American, or who adopt a child who is non-white. CA App. 73, 74, 80-81.

Klan, seeking a declaratory judgment that it was permitted to exclude the Klan from the program. See *ibid.* The Klan counterclaimed, seeking a declaratory judgment and a writ of mandamus ordering the State to allow it to participate in the Adopt-A-Highway program. See *Missouri Hwy. & Transp. Comm'n* v. *Cuffley*, 112 F.3d 1332, 1333 (8th Cir. 1997) ("*Cuffley II*").

The district court held that exclusion of the Klan from the Adopt-A-Highway program would violate the Klan's First Amendment rights. The court reasoned that the Klan's participation in the program would constitute speech because picking up litter conveys a message of environmental consciousness and civic responsibility, rejecting the MHTC's argument that the only speech or expressive activity involved in the program is the sign itself, which is government speech. *Cuffley I*, 927 F. Supp. at 1255. The court also rejected the argument that the MHTC would violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which bars discrimination on the basis of race by programs or activities that receive federal funds, if it granted the Klan's application. *Cuffley I*, 927 F. Supp. at 1259-1261 & n.7.[3]

The Eighth Circuit vacated the district court's judgment on jurisdictional grounds without reaching the merits of the First Amendment claims, and remanded the case to the district court with instructions to dismiss the action. *Cuffley II*, 112 F.3d at 1334-1338.

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[3] In addition, the court rejected the MHTC's argument that Klan participation in the program would interfere with the State's school desegregation efforts by causing fear on the part of students, notwithstanding the contrary conclusions of a state-sponsored study that had interviewed students being bused, including a student whose grandfather had been murdered by the Klan. *Cuffley I*, 927 F. Supp. at 1262 n.9.

D. Denial Of The Klan's Application And Proceedings Below

1. Following dismissal of the declaratory judgment action in *Cuffley I*, the MHTC denied the Klan's application to participate in the Adopt-A-Highway program. See App., *infra*, 3a, 21a.[4] The Klan responded by filing this suit under 42 U.S.C. § 1983, claiming that its exclusion from the program violated its rights under the First Amendment and Equal Protection Clause of the U.S. Constitution, and seeking an injunction barring the MHTC from denying its application. The parties cross-moved for summary judgment.

The district court granted the Klan's motion for summary judgment in part, finding that the Klan's total exclusion from the Adopt-A-Highway program violated the First Amendment. App., *infra*, 25a-27a. Insofar as is relevant here, the court considered, and rejected "for the same reasons stated in *Cuffley I*," the MHTC's argument that any speech at issue in the Adopt-A-Highway program is that of the State rather than of the Klan. *Id.* at 22a. The court also rejected the MHTC's contention that the Klan could be excluded from the program because its

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[4] The MHTC stated five independent reasons for its decision: (i) the Klan had violated state and federal anti-discrimination laws, making it ineligible to adopt a highway under the regulations governing the program; (ii) the Klan's history of unlawful violence barred it from participation in the program under the regulations; (iii) Title VI prohibited the MHTC from conferring a benefit on the Klan because of the Klan's discriminatory practices; (iv) permitting the Klan to participate in the program would be unlawful under a state executive order prohibiting Missouri agencies from allowing discriminatory practices on state facilities and from contracting with organizations that discriminate; and (v) because the Missouri Transportation Department had imposed a moratorium on participation in the Adopt-A-Highway program in St. Louis for safety reasons, the MHTC no longer allowed any new applications within the city. See App., *infra*, 3a.

racially discriminatory membership criteria violated Title VI. *Id.* at 25a-26a. The court therefore granted summary judgment to the Klan on its First Amendment claim, enjoining the State from denying the Klan's application on those grounds.[5]

2. The Eighth Circuit affirmed entry of judgment in favor of the Klan. App., *infra*, 1a-17a. At the outset, the court expressed the belief that the State had denied the Klan's application because it objected to the Klan's endorsement of racial discrimination; the court declared that, "absent a convincing and constitutional reason for the denial," it was left with the conclusion that State excluded the Klan from the program because it disapproved of the Klan's ideology of racial exclusion. *Id.* at 8a. The court went on to state that, in its view, the MHTC's articulated reasons for rejecting the Klan's application were "pretextual" because they did not in fact provide a "convincing and constitutional reason for the denial." *Id.* at 15a-16a.

In reaching that conclusion, the court dismissed the MHTC's concern that "the State would enter into some kind of 'prohibited' relationship" if it permitted the Klan to conduct roadway cleanup under the auspices of the Adopt-A-Highway program. App., *infra*, 11a. The court did not disagree with the MHTC's view that a State *may* exclude a group from a government program in circumstances where, if the group participated, its discriminatory practices would constitute state action. The court held, however, that participation in the Adopt-A-Highway program would not make the Klan a state actor because the program is analogous to one in which the State is simply "offering service to a group of customers." *Ibid.*

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[5] The district court did hold that the State's moratorium on highway adoptions within St. Louis city limits provided a reasonable, viewpoint-neutral basis for rejection of the Klan's application. Because the Klan had not sought to adopt any other stretch of highway, the court found that the moratorium justified denial of the Klan's application. App., *infra*, 27a-28a.

The court also rejected the argument, advanced both by the MHTC and by the United States (which participated in the case as *amicus* in support of the State), that allowing the Klan to join the Adopt-A-Highway program despite its discriminatory membership policies would violate Title VI's "prohibition on any arrangement that bars individuals from participating in a program on the basis of race." App., *infra*, 13a-15a. Again, the court did not disagree with the MHTC's premise that the First Amendment would permit exclusion of the Klan if allowing Klan participation *would* in fact violate Title VI. But Title VI was not violated here, the court held, so long as the State had not "den[ied] anyone an opportunity *to adopt a highway* on an improper basis." *Ibid.* (emphasis added).[6]

Finally, the court declined to adopt the view, also expressed both by the MHTC and by the United States, that the only speech involved in the Adopt-A-Highway program is that of the *State*. The court contrasted the situation in this case with issues that arise in the public broadcasting context, where "editorial discretion to select programming and sponsors looms large." App., *infra*, 4a-5a n.3. The court therefore did not find it problematic that the State was forced, through its speech, to associate itself with the Klan. Accordingly, the court affirmed entry of judgment in favor of the Klan.

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[6] The court also rejected the MHTC's other reasons for denial of the Klan's application. The moratorium on highway adoptions in St. Louis (see note 5, *supra*) was no longer applicable because the Klan had amended its application to list a different stretch of Interstate 55. App., *infra*, 9a. The court found the State's other rationales — that the Klan failed to adhere to state and federal nondiscrimination laws, that it has a history of criminal violence, and that its participation would promote discriminatory practices — to be either constitutionally impermissible or pretextual. *Id.* at 9a-16a. Although the State strongly disagrees with these latter holdings, they are not at issue in this petition.

The State's petition for rehearing en banc was denied over the dissenting votes of two judges. App., *infra*, 31a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision in this case has a shocking impact: it requires Missouri to permit the Ku Klux Klan to perform functions for which the State bears responsibility, to countenance the performance of those state functions in racially discriminatory ways that are profoundly offensive, and to erect a sign — at the State's expense — that essentially dedicates a portion of a public highway to the Klan. Beyond that immediate impact, the decision below has implications for the Nation as a whole. Forty-eight States sponsor Adopt-A-Highway programs similar to the one in Missouri; of those, nine States in addition to Missouri have rejected applications from the Klan, and additional States have refused to consider applications from similar hate groups.[7] The policies of all of those States are called into question by the court of appeals' ruling here.

That decision should not stand, for several reasons. The Eighth Circuit's holding that the Klan's actions under the Adopt-A-Highway program do not constitute state action cannot be reconciled with decisions of this Court, and contributes to pervasive confusion among the courts of appeals about the

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[7] See Oklahoma Dep't of Transp., *1999 Adopt-A-Highway Survey: United States and International* (Oct. 1999), summarized at University of Vermont, Vermont Legislative Research Shop, *Adopt-A-Highway* (last visited Aug. 14, 2000) <http://www.uvm.edu/~vlrs/doc/adoptahighway.htm>. Rejected applicants have turned to the federal courts, suing to be permitted to participate in the program; the results have been inconsistent. *E.g.*, *Texas* v. *Knights of Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995) (upholding exclusion of Klan); *Knights of Ku Klux Klan* v. *Arkansas State Highway & Transp. Dep't*, 807 F. Supp. 1427 (W.D. Ark. 1992) (requiring inclusion of Klan); see also J. Woestendiek, *Klan cleanup plan hits dead-end road*, PHILA. INQUIRER 1/24/98, reprinted at <http://www.stop-the-hate.org/klanroad.html>.

proper application of state action doctrine. The attempt below to square the Klan's participation in the Adopt-A-Highway program with the requirements of Title VI threatens to eviscerate that statute, while calling into question the rules governing federal funding of transportation programs across the country. And the Eighth Circuit's analysis improperly gave no weight to the State's compelling interest in determining the content of its *own* speech. In these circumstances, further review of the decision below is in order.

Before turning to the substance of the arguments in support of certiorari, however, it is appropriate to address one threshold consideration: the need for review is not undermined by the court of appeals' declaration that the MHTC's stated reasons for denying the Klan's application were "pretextual." App., *infra*, 16a. For one thing, the Eighth Circuit's conclusion regarding "pretext" was based principally on its belief that there was no "convincing and constitutional reason for the denial" of the Klan's application (*id.* at 8a) and that the MHTC's stated reasons for that denial were "obviously unreasonable." *Id.* at 16a. Because, as we explain below, the State actually had compelling (and legally permissible) reasons for excluding the Klan from the Adopt-A-Highway program, the premise that underpins the court's assumption of pretext falls away.[8] And more fundamentally, the court of appeals' discussion of pretext

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[8] In making that assumption, the court pointed to a state official's testimony about the careful review given to the Klan's application in 1994 — testimony given *before* the Klan's application had been denied. App., *infra*, 5a-7a. The court took from this testimony that "the State treated the Klan differently from the vast majority of applicants based on the State's perception of the Klan's beliefs and advocacy." *Id.* at 8a. The court also acknowledged, however, that the reasons given for subjecting the Klan's application to "further review" were not necessarily the reasons that supported denial of the application (*ibid*), meaning that the dispositive question was whether the State had advanced a "convincing and constitutional reason for the denial."

ultimately is beside the point. The State was not obligated to disregard the Klan's practice of racial discrimination when ruling on the Klan's application; to the contrary, it is that very practice that *justified* the MHTC's decision to exclude the Klan from the Adopt-A-Highway program. The Eighth Circuit's contrary conclusion is insupportable.

I. THE EIGHTH CIRCUIT'S STATE ACTION HOLDING WARRANTS FURTHER REVIEW

The Eighth Circuit flatly rejected the State's theory that permitting the Klan to participate in the Adopt-A-Highway program would violate the Equal Protection Clause, opining that the Klan's racial discrimination against potential volunteers for the program would not constitute state action. The court of appeals' holding on this recurring issue, however, not only conflicts with this Court's prior decisions, but also deepens the pervasive confusion in the lower courts over the constitutional status of volunteers or contractors performing government functions.

A. The Eighth Circuit's State Action Holding Conflicts With This Court's "Public Function" Cases

Ostensibly private conduct constitutes state action when it "resulted from the exercise of a right or privilege having its source in state authority" by a private party who "could be described in all fairness as a state actor." *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 620 (1991); accord *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 50 (1999). The first prong of this test is clearly met here because the Klan's exclusion of African-Americans and other racial or ethnic minorities from the Adopt-A-Highway program is made possible by the state-created right to participate in highway cleanup under the auspices of the MHTC.

As for the remaining prong of the test, the actions of the Klan pursuant to the Adopt-A-Highway program are fairly attributable to the State because the Klan is carrying out the

public function of highway maintenance — a function that is traditionally and exclusively performed by the State. Maintenance of highway rights-of-way is a legal obligation of the State. See MO. ANN. STAT. § 227.030 ("[T]he state highways and transportation commission * * * is hereby * * * directed * * * to provide for the proper maintenance of said state highway system."); see also 23 U.S.C. §§ 116, 119; 23 C.F.R. § 635.505(a)(3). It is also an *exclusive* obligation, releasing fee landowners from any responsibility. See *Mispagel*, 785 S.W.2d at 282; *Martin*, 981 S.W.2d at 580-582. In performing those activities, the Klan receives supplies, safety training, and assistance from the State. See page 5, *supra*.

The Klan's conduct thus meets the requirements for state action under this Court's precedents. In *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), the Court recognized that state action could be found where, as here, the private actor carried out an obligation imposed directly on the State itself by statute or court precedent. *Id.* at 353. In *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982), the Court emphasized that the state obligation had to be "the exclusive province of the State" — as is the case with the MHTC's highway maintenance obligations. *Id.* at 842; accord *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 157-163 (1978). And in *Edmonson*, the Court recognized that state action would be found where a private body exercised power that otherwise would be held by the State itself — which is true of the Klan's exercise of its delegated authority to maintain the roadway, a function that otherwise would be performed solely by the State. 500 U.S. at 625. The Eighth Circuit's holding cannot be reconciled with these decisions.

B. The Courts Of Appeals Are Deeply Split Over Whether Volunteers Or Contractors Performing Functions Traditionally Carried Out By The State Become State Actors

There is little doubt that if Missouri satisfied its legal and exclusive obligation to conduct highway maintenance by hiring

and supervising state employees, those employees would be "state actors" when engaged in the course of their maintenance duties. The question presented here and in similar cases is whether state-sponsored and -sanctioned volunteers or outside contractors, performing those same duties, are exempt from constitutional strictures. See *Rendell-Baker*, 436 U.S. at 163-164. In holding that the Klan is not a state actor when participating in (and selecting members to participate in) the Adopt-A-Highway program, the Eighth Circuit contributed to pervasive confusion in the lower courts over the proper treatment of volunteers and contractors who perform government work.

In contrast to the Eighth Circuit in this case, numerous courts of appeals have held that volunteers become state actors when they provide traditional state services. The Third Circuit, for example, has concluded that a Pennsylvania volunteer fire company is a state actor subject to constitutional restraints — notwithstanding that fire protection in Pennsylvania is frequently provided by private volunteers — because firefighting is a "governmental function" required of municipalities. *Mark* v. *Borough of Hatboro*, 51 F.3d 1137, 1144-1148 (3d Cir. 1995). The Second Circuit has reached a similar conclusion, holding that a volunteer fire company's dismissal of a member constitutes state action because fire fighting duties are "'associated with sovereignty'" as an "exclusive function of government," despite the fact that firefighting in the State was typically carried out by volunteer groups. *Janusaitis* v. *Middlebury Volunteer Fire Dep't*, 607 F.2d 17, 23-25 (2d Cir. 1979) (citation omitted).

The same analysis has been applied to find that for-hire contractors are state actors when performing statutorily mandated government duties. In *Frazier* v. *Bailey*, 957 F.2d 920 (1st Cir. 1992), for example, private social workers and physicians were hired to carry out the State's statutory obligation to investigate suspected child abuse, and also treated the suspected victim. See *id.* at 923-926. The First Circuit held that these private parties were acting under color of state law because they

had "contracted with [state agencies] to provide services required by statute." *Id.* at 928. Similarly, in *Warner* v. *Grand County*, 57 F.3d 962 (10th Cir. 1995), the Tenth Circuit held that a private individual was acting under color of state law when she assisted in executing a strip search for contraband, because the police search power "has traditionally been reserved for the states." *Id.* at 964; accord *Rodriques* v. *Furtado*, 950 F.2d 805, 814 (1st Cir. 1991) (physician acted under color of state law in carrying out a cavity search on behalf of the police, because he "exercised the power of search traditionally reserved exclusively to the State").[9]

Other courts, in contrast, have refused to find state action when volunteers or contractors perform public functions such as fire fighting. In *Yeager* v. *City of McGregor*, 980 F.2d 337 (5th Cir. 1993), the Fifth Circuit held that a volunteer fire department was not a state actor, reasoning that firefighting had long been engaged in across the nation by volunteer and private, as well as government-employed, companies, and that the city was not compelled to establish a fire department. *Id.* at 341. Similarly, in *Groman* v. *Township of Manalapan*, 47 F.3d 628 (3d Cir. 1995), the court rejected the argument that members of a volunteer first-aid squad were state actors, calling the Fifth Circuit's analysis in *Yeager* "more persuasive" on this point than the Second Circuit's contrary reasoning in *Janusaitis*. *Id.*

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[9] Indeed, several circuits have suggested that the duties carried out by the private person need not be an obligation of the State for the private person to be considered a state actor, so long as the duties would otherwise be performed by state employees. See, *e.g.*, *Young* v. *Murphy*, 90 F.3d 1225, 1234 (7th Cir. 1996) (holding that doctor who performed competency examination for Public Guardian of Cook County was "acting under color of state law" because examination would otherwise have been conducted by state official); *Lawyer* v. *Kernodle*, 721 F.2d 632, 635 (8th Cir. 1983) (holding that private physician hired by State to conduct autopsy for state coroner's office was "acting under color of state law").

at 641. And in *George* v. *Pacific-CSC Work Furlough*, 91 F.3d 1227 (9th Cir. 1996), the Ninth Circuit found that a private correctional facility was not a state actor when it terminated an officer, allegedly as a result of his reporting of safety violations. *Id.* at 1229-1230. The Ninth Circuit reasoned that the specific conduct complained of, the officer's discharge, was insufficiently related to any public function to establish state action. *Id.* at 1231; but see *Goldstein* v. *Chestnut Ridge Volunteer Fire Co.*, ___ F.3d ___, 2000 WL 961590, *10 (4th Cir. July 12, 2000) (rejecting requirement of a nexus between indicia of state action and specific acts comprising alleged constitutional violation).

Courts in the Fourth Circuit, faced with this conflicting authority, have reached inconsistent results. In *Haavistola* v. *Community Fire Co.*, 6 F.3d 211 (4th Cir. 1993), a female volunteer firefighter claimed that the fire company had violated 42 U.S.C. § 1983 by refusing to reinstate her following her allegation of sexual assault by another volunteer. The Fourth Circuit held that the fire company's status could not be determined as a matter of law, in light of evidence that firefighting in Maryland had traditionally been carried out by volunteer companies rather than the State. *Id.* at 218-219; accord *Goldstein* v. *Chestnut Ridge Volunteer Fire Co.*, 25 F.3d 1039, 1994 WL 233356, *2 (4th Cir. May 31, 1994) (holding, based on *Haavistola*, that "the question whether fire fighting is traditionally an exclusive governmental function in Maryland could not properly be decided as a matter of law * * * but requires resolution of genuine issues of fact raised by the conflicting historical evidence"). The upshot is that, as Chief Judge Wilkinson predicted in concurrence in *Goldstein*, "volunteer fire companies whose circumstances are indistinguishable * * * find themselves irreconcilably labelled" in the Fourth Circuit. 1994 WL 233356, at *2. Compare *Haavistola* v. *Community Fire Co.*, 839 F. Supp. 372 (D. Md. 1994) (on remand) (describing jury's special verdict finding that Maryland volunteer fire company was not a state actor), with *Goldstein* v. *Chestnut*

Ridge Volunteer Fire Co., 984 F. Supp. 367 (D. Md. 1997) (on remand) (holding as a matter of law that Maryland volunteer fire company was a state actor), aff'd, 2000 WL 961590, *4-*10 (4th Cir. July 12, 2000).

This Court has recognized that its "'cases deciding when private action might be deemed that of the state have not been a model of consistency.'" *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995) (quoting *Edmonson*, 500 U.S. at 632 (O'Connor, J., dissenting)). The effect of this inconsistency has been sharply divergent treatment of similarly-situated volunteers and contractors engaged in public functions. Review by this Court accordingly is necessary to resolve the lower courts' confusion and to clarify the analytical framework to be used in determining when volunteers and contractors performing public services become state actors.

II. THE COURT OF APPEALS MISAPPLIED TITLE VI IN A WAY THAT WILL GENERATE CONFUSION IN THE LOWER COURTS AND CREATE UNCERTAINTY ABOUT THE FEDERAL FUNDING OF TRANSPORTATION PROGRAMS

Review also is warranted because the court of appeals premised its holding on a fundamental misreading of Title VI. Both the State and the United States argued below that permitting the Klan to participate in the Adopt-A-Highway program — thus ceding the Klan substantial responsibility for highway maintenance in its designated area — would violate Title VI. In rejecting that argument, the court of appeals acknowledged that the MHTC receives federal funds, and the court also evidently recognized that the First Amendment would permit exclusion of the Klan from the Adopt-A-Highway program if that were necessary to comply with Title VI. The court nevertheless held Title VI inapplicable here, however, reasoning that

> [n]either the Klan nor the State would operate a subprogram on the Klan's adopted stretch of highway; instead, the Klan simply would be one of many participants in the

> overall Adopt-A-Highway program. So long as the State does not deny anyone an opportunity to adopt a highway on an improper basis, the State does not violate Title VI.

App., *infra*, 14a-15a. But this analysis, which gives the wrong answer to a recurring legal question of great practical significance, should not stand.

1. At the outset, the court of appeals misread Title VI in a way that is sure to generate confusion in the lower courts. *First*, the Eighth Circuit's analysis is inconsistent with the plain language of Title VI. The statute provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. The "program or activity" that is subject to this anti-discrimination requirement is in turn defined, in relevant part, as "*all the operations* of * * * [a] department, agency, special purpose district, or other instrumentality of a State or of a local government * * * any *part* of which is extended Federal financial assistance." 42 U.S.C. § 2000d-4a (emphasis added). Giving this language an exceedingly narrow construction, the court of appeals concluded that the only relevant inquiry in this case is whether the State discriminates in determining *which entities may participate in the Adopt-A-Highway program.* Because *that* determination is not made in a discriminatory manner, the court of appeals held Title VI inapposite here.

That cramped approach to Title VI, however, would eviscerate the statute. Because the MHTC receives federal funds, the plain language of Title VI requires that "*all*" of its "operations" be conducted in a manner that is free of discrimination on the basis of race, color, or national origin. The "operations" that fall within the scope of Title VI accordingly include the highway maintenance and cleanup that the MHTC funds and for which it is statutorily responsible — operations that are performed for the State, in part, by participants in the

Adopt-A-Highway program.[10] Yet on the Klan's stretch of highway, those operations concededly are conducted in a racially discriminatory manner because persons are excluded from participating in them on the basis of race.

In this regard, it is beside the point that the State makes use of a third party to conduct its maintenance and cleanup operations. It would violate Title VI for the MHTC to hire only "Aryan" workers to clean up Missouri's highways; the MHTC surely could not avoid that prohibition by retaining a maintenance contractor whose stated policy is to hire only "Aryan" employees to work on the State's roads. Yet allowing the Klan to assume the State's maintenance responsibilities under the aegis of the Adopt-A-Highway program presents precisely the same situation. As the court put it in *Texas* v. *Knights of the Ku Klux Klan*, 853 F. Supp. 958, 960 (E.D. Tex. 1994), aff'd on other grounds, 58 F.3d 1075 (5th Cir. 1995), in holding that it would violate Title VI for the Klan to participate in Texas's Adopt-A-Highway program,

> [b]y receiving * * * Federal Highway Administration funds, the State is prohibited from awarding contracts or

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[10] It is notable that the State provides materials used by participants in the Adopt-A-Highway program (see page 5, *supra*), meaning that the Klan's participation plainly runs afoul Title VI's fundamental purpose of "avoid[ing] the use of federal resources to support discriminatory practices." *Cannon* v. *University of Chicago*, 441 U.S. 677, 704 & n.36 (1979). At the same time, the fact that Missouri's use of Adopt-A-Highway volunteers saves the State money that otherwise would be spent on highway maintenance (see page 3, *supra*) demonstrates that the activities of program participants must be viewed as a state "operation." Indeed, in *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 469-470 (1999), the Court left open the closely related question whether, "when a recipient [of federal funds] cedes controlling authority over a federally funded program to another entity, the controlling entity is covered by Title IX regardless whether it is itself a recipient."

> conferring benefits on persons or groups who are not equal opportunity employers, or who discriminate against any protected group. * * * Consequently, the State of Texas and the Texas Department of Transportation, by granting the Ku Klux Klan's application, would be in violation of Title VI of the Civil Rights Act of 1964 and would be subject to losing federal funding for state highways.[11]

Second, this conclusion is confirmed by regulations that were promulgated by the U.S. Department of Transportation to effectuate and enforce Title VI. These regulations provide that a recipient of federal transportation funds "shall not, directly *or through contractual or other arrangements*," engage in discriminatory conduct, including denial of an "opportunity to participate in the program through the provision of services or otherwise." 49 C.F.R. § 21.5(b)(1)(vi), (c)(1) (emphasis added). This regulatory provision plainly understands Title VI to bar state recipients of federal funds from using third parties to conduct state operations in a manner that discriminates on the

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[11] It is no answer to this point to note, as did the court of appeals, that persons excluded from the Klan may adopt a *different* stretch of highway. See App., *infra*, 14a-15a. As the United States put it while supporting the State's position before the Eighth Circuit, "the fact that non-whites would be barred from the Klan's designated area, but not [from] other portions of the Adopt-A-Highway program, does not make the exclusion any less discriminatory. A minority university student who is excluded from the school's history department on the basis of race is discriminated against even though he or she may participate in all of the university's other programs." *Cuffley* v. *Mickes*, No. 99-2334, Brief for the United States ("U.S. Br.") 17 (8th Cir. filed Aug. 19, 1999). Nor does it matter, as the court of appeals also noted, that persons who are not members of the Klan may choose on their own to remove litter from the Klan's stretch of highway. Such individuals would not be operating under the imprimatur of the State, would not receive state supplies or training, and thus *would* be excluded from the state-sponsored cleanup operation performed on that portion of the highway.

basis of race. But that is just what is happening here: the Klan's participation in the Adopt-A-Highway program is an "arrangement" that denies disfavored groups the opportunity to participate in elements of the MHTC's maintenance operations. This regulatory understanding of the statute is, of course, entitled to great deference. See, *e.g.*, *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 739-741 (1996).

Third, the court of appeals' construction of Title VI is inconsistent with the manifest congressional intent. In *Grove City College* v. *Bell*, 465 U.S. 555, 571-574 (1984), the Court construed the term "program or activity" narrowly, holding that use of that term in Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681(a), prohibited discrimination only in the *specific* program that received federal financial assistance. Congress promptly responded by enacting the Civil Rights Restoration Act of 1987 ("CRRA"), Pub. L. No. 100-259, 102 Stat. 28 (1988), which gave "program or activity" its current broad definition as something that includes "all" of the operations of a department or agency, any "part" of which receives federal funds. See *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 466 n.4 (1999); *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 73 (1992) (in enacting the CRRA, Congress "correct[ed] what it considered to be an unacceptable decision on our part in *Grove City*"). In doing so, Congress emphasized repeatedly "that discrimination is prohibited throughout entire agencies or institutions" and that Title VI (and other statutes making use of the "program or activity" formula) are to be "given the broadest interpretation." S. Rep. No. 100-64, 100th Cong., 1st Sess. 6, 7, 9 (1987). But the court of appeals' approach in this case — which looks only at a *single* phase of the MHTC's operations (the decision whether to permit participation in the Adopt-A-Highway program), rather than at *all* of the operations for which MHTC is responsible — is closely analogous to the discredited approach of *Grove City*.

Fourth, the United States has strongly endorsed the conclusion that permitting the Klan to participate in the Adopt-

A-Highway program violates Title VI. Arguing below as an *amicus* in support of the State, the United States[12] explained that

> Missouri's acceptance of the Klan in its Adopt-A-Highway program would violate Title VI and DOT's implementing regulations. * * * The Klan's membership restrictions exclude subject individuals on the basis of race, color, and national origin, * * * and such discrimination would carry over to the Adopt-A-Highway program. * * * If only Klan members may participate in its designated area of the Adopt-A-Highway, Missouri would be unlawfully sanctioning conduct that bars individuals from participating in a portion of this program. See *Texas*, 853 F. Supp. at 960; 42 U.S.C. § 2000d. The violation is not premised on the beliefs espoused by the Klan, but on the Klan's practice of excluding non-whites from its membership, and, in turn, Missouri's program.

U.S. Br. 17.

The United States also noted that "Missouri's allowance of the Klan's participation in the program would violate the regulatory prohibition on any 'arrangement' with a third party that bars individuals from participating in a program on the basis of race." U.S. Br. 18. The United States therefore concluded that "if the Klan, or any other entity, denied participation in its segment of the Adopt-A-Highway program on the basis of race, color, or national origin, Missouri would violate Title VI and its regulations. Accordingly, Missouri correctly determined that it must deny the Klan's application to participate in the Adopt-A-Highway program to comply with Title VI." *Id.* at 19. This conclusion is, again, due considerable deference. See, *e.g.*, *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).

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[12] The brief for the United States was signed both by the Civil and Civil Rights Divisions of the Justice Department and by the Department of Transportation.

2. The court of appeals' error regarding Title VI warrants this Court's attention. Most immediately, as we have noted, 48 States have Adopt-A-Highway programs similar to the one in Missouri — and at least 9 States in addition to Missouri have refused to allow the Klan to participate in those programs. Yet the decision below creates grave doubts about the ability of those States to exclude the Klan or similar groups that have discriminatory membership policies. Indeed, the court of appeals' decision presents those States with an intolerable dilemma. The U.S. Department of Transportation has taken the position that, "if the Klan, or any other entity, denied participation in its segment of the Adopt-A-Highway program on the basis of race, color, or national origin, [the State] would violate Title VI and its regulations." U.S. Br. 19. States accordingly face loss of federal highway funds if they comply with the Eighth Circuit's rule, while facing legal liability if they do not. At the same time, of course, the Eighth Circuit's holding poses the flip side of that problem for the Department of Transportation, which must decide whether to sanction States that follow the court of appeals' rule; this uncertainty raises the prospect that different federal funding rules will be applied in different States. In these circumstances, where the court of appeals' decision creates uncertainty about the rules that govern ongoing federal funding decisions, immediate review of this case is imperative.

More generally, the Eighth Circuit's decision threatens to cause considerable confusion about the proper construction of a range of significant federal statutes. The CRRA's definition of "program or activity" applies not only to Title VI, but also to Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1687, the Rehabilitation Act, 29 U.S.C. § 794, and the Age Discrimination Act of 1975, 42 U.S.C. § 6107. The court of appeals' holding here thus calls into question the application of all of those statutes in circumstances where the State conducts its operations through third-party contractors or volunteers. For

this reason as well, further consideration of the decision below is appropriate.

III. THE COURT OF APPEALS ERRED IN REFUSING TO ALLOW THE STATE TO CONTROL ITS OWN SPEECH

Finally, the court of appeals erred in a way that warrants this Court's attention by failing to take proper account of the State's interest in controlling its *own* speech. Both the MHTC and the United States argued before the Eighth Circuit that any speech or expression involved in the Adopt-A-Highway program was that of the State, rather than of the Klan. See *Cuffley* v. *Mickes*, No. 99-2334, Appellants' Brief 9, 14-16 (8th Cir. filed July 29, 1999); U.S. Br. 21-29. The Eighth Circuit gave this argument the back of its hand, dismissively holding that the State's own views are immaterial here because this case does not involve "unique" circumstances "in which editorial discretion * * * looms large." App., *infra*, 4a-5a n.3. That analysis, however, disregarded this Court's precedents regarding governmental speech.

1. In finding a First Amendment violation here, the court of appeals reasoned that the State excluded the Klan from the Adopt-A-Highway program because it disapproved of the Klan's repulsive ideology.[13] Even assuming that to be true,

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[13] The court of appeals expressed no view on whether the Klan itself engaged in speech by participating in the Adopt-A-Highway program. App., *infra*, 4a-5a n.3. In fact, it plainly did not. See *Dallas* v. *Stanglin*, 490 U.S. 19, 25 (1989); *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968). As the United States pointed out in its *amicus* brief in the court below, "[a]ny activity, such as mowing one's lawn or deciding to perform military service, may plausibly be described as conveying a message of good citizenship. But the Supreme Court has emphatically rejected a broad reading of the First Amendment that would convert every regulation of conduct into regulation of speech."

(continued...)

however, that is not all there is to this case. There are two aspects of the Adopt-A-Highway program that are relevant here: the State provides a sort of benefit to program participants by allowing them to engage in roadside maintenance; and the State engages in speech by erecting a sign that acknowledges (and implicitly thanks) the participants. So far as this expressive part of the program is concerned, the expression is that of the State, and of the State alone. The State chooses the message to be expressed, selects the format in which it will be expressed, and carries out the expression by paying for, manufacturing, and erecting the signs. See page 5, *supra*. Volunteers provide their names to the State, of course, but the State has refused to post signs with names it does not like. See *ibid.* In short, the State is solely responsible for the decisions whether to speak and what to say.

In these circumstances, where the State is speaking for itself, it has every right to engage in content and viewpoint discrimination. "[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); see also, *e.g.*, *Rust* v. *Sullivan*, 500 U.S. 173, 192-194 (1991); *Columbia Broad. Sys., Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression."); *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 14-15 (1978) (plurality). As then-Judge Scalia put it for the D.C. Circuit:

> A rule excluding official praise or criticism of ideas would lead to the strange conclusion that it is permissible for the government to prohibit racial discrimination, but not to criticize racial bias; to criminalize polygamy, but not to praise the monogamous family; to make war on Hitler's

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[13] (...continued)
U.S. Br. 22.

> Germany, but not to denounce Nazism. It is difficult to imagine how many governmental pronouncements, dating from the beginning of the Republic, would have been unconstitutional on that view of things.

Block v. *Meese*, 793 F.2d 1303, 1313 (D.C. Cir. 1986).

This government speech doctrine plainly applies here. Thus, even if the Klan must be permitted to clean up Missouri's highways, the MHTC may not, consistent with this Court's decisions, be forced to post a sign acknowledging the Klan, thereby suggesting that the State approves of, and is grateful for, the Klan's participation in the Adopt-A-Highway program. The State has every right to select the viewpoint it wishes to convey where the Adopt-A-Highway program is concerned — just as it may choose to promote a message of non-discrimination, rather than of racism, in its public service announcements, or may name a highway in honor of Martin Luther King, Jr., rather than after Bull Connor. Requiring the State to admit the Klan to the Adopt-A-Highway program and to erect a sign acknowledging its participation therefore intrudes significantly on the State's autonomy of speech. The Eighth Circuit's holding to the contrary utterly disregards the State's interest in controlling its own message.

2. The need for review on this issue is particularly acute because the government speech doctrine has been the source of continuing uncertainty in the courts of appeals, which often have failed to recognize that, for First Amendment purposes, government speech is not a "forum" at all, non-public or otherwise. The pervasive confusion in this area of the law is aptly illustrated by the sharply divergent analyses of courts faced with claims that the Klan is entitled to participate in state Adopt-A-Highway programs. Compare *Texas* v. *Knights of Ku Klux Klan*, 58 F.3d 1075, 1078 (5th Cir. 1995) (holding that relevant forum is Adopt-A-Highway program, which is non-public forum), and App., *infra*, 22a-24a (holding that relevant forum is Adopt-A-Highway program, which is non-public

forum), with *Cuffley I*, 927 F. Supp. at 1257, 1263 (holding that relevant forum is highway right-of-way, which is designated public forum), and *Knights of Ku Klux Klan*, 807 F. Supp. at 1436-1437 (holding that relevant forum is highway right-of-way, which is public forum); see also S. Montgomery, *When the Klan Adopts-A-Highway: The Weaknesses of the Public Forum Doctrine Exposed*, 77 WASH. U. L. Q. 557, 558 (1999) (in "recent Adopt-A-Highway cases in Missouri, Texas, and Arkansas," "four different federal courts, confronted with three substantially similar problems, approached the public forum doctrine in five different ways" and "reached three different decisions regarding the type of forum at issue"). Courts have applied similar illogic in other factual settings, struggling to uphold viewpoint restrictions under a forum analysis that does not apply, and cannot reasonably be applied, to government speech. See, *e.g.*, *Serra* v. *U.S. Gen. Servs. Admin.*, 847 F.2d 1045, 1048-1050 (2d Cir. 1988) (holding that government is permitted to remove state-owned sculpture because the artwork is government speech, but suggesting that the "message" or "viewpoint" of the artwork could not be a motivating reason for its removal); *Hawkins* v. *City and County of Denver*, 170 F.3d 1281, 1289 (10th Cir. 1999) (holding that denial of access to nonpublic forum for purpose of rebutting government speech "does not amount to unlawful viewpoint discrimination"), cert. denied, 120 S. Ct. 172 (1999).

These cases highlight the need for this Court to provide guidance about the proper scope of the government speech doctrine. Although the Court has repeatedly acknowledged that the government may select its own message, see page 25, *supra*, it has never examined the scope of that doctrine or how it relates to forum analysis. Nor has the Court addressed the question whether the government's interest in selecting its own message may limit the rights of an individual or group to participate in a government-sponsored program, thereby associating itself with the State. This case presents a suitable vehicle with which the Court could consider those vitally important issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUGUST 2000

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-2334
No. 99-2501

Michael Cuffley; Knights of the Ku Klux Klan, Realm of Missouri, Appellees/Cross-Appellants, v. Joe Mickes, in his official capacity as Chief Engineer of the Missouri Department of Transportation; Stephen Knobbe, in his official capacity as District Engineer of Missouri Department of Transportation, St. Louis Metro District; Stacey Ann Armstrong, in her official capacity as Roadside Management Supervisor of the Missouri Highway and Transportation Department; Thomas M. Boland; Robert E. Jones; Edward Douglas; S. Lee Kling; James W. Gamble; William E. Gladden, in their official capacities as commissioners of the MO Highway and Transportation Commission, Appellants/Cross-Appellees. Arkansas State Highway Commission; United States of America.	*	Appeal from the United States District Court for the Eastern the Eastern District of Missouri

Amici on Behalf of Appellant. *

Submitted: January 11, 2000
Filed: March 31, 2000

Before WOLLMAN, Chief Judge, BOWMAN, and HANSEN, Circuit Judges.

BOWMAN, Circuit Judge.

The Knights of the Ku Klux Klan, Realm of Missouri, and Michael Cuffley in his capacity as its Unit Recruiter (collectively, the Klan) brought this action for injunctive and declaratory relief from the decision of the Missouri Highway and Transportation Commission (the State) to deny its application to participate in the State's Adopt-A-Highway program. On cross motions for summary judgment, the District Court[1] granted judgment for the Klan. We affirm.

I.

This is the second appeal in the Klan's effort to participate in the Adopt-A-Highway program. In the first case, the State, without taking official action on the Klan's application, sought a declaratory judgment that it lawfully could prevent the Klan from adopting a highway. See Missouri ex rel. Missouri Highway & Transp. Comm'n v. Cuffley, 927 F. Supp. 1248 (E.D. Mo. 1996) (Cuffley I). We dismissed that action because we lacked jurisdiction over the State's request for essentially an advisory opinion on its plan to deny the application. See Cuffley I, 112 F.3d 1332 (8th Cir. 1997) (finding no federal question jurisdiction and no Article III case or controversy). At

[1] The Honorable Stephen N. Limbaugh, United States District Judge for the Eastern District of Missouri.

the time, we emphasized that "we cannot determine what reasons the State actually will choose to support its denial." Id. at 1338.

The State now has acted on the Klan's application. In an August 14, 1997, letter to the Klan, the State gave five reasons for denying its application:

> [1] The Knights of the Ku Klux Klan does not adhere to all state and federal nondiscrimination laws in that it discriminates on the basis of race, religion, color and national origin. [2] The Knights of the Ku Klux Klan has a history of unlawfully violent and criminal behavior. [3] 42 USC 2000(d)4a(I)(A) [Title VI of the Civil Rights Act of 1964] prohibits Missouri Department of Transportation from conferring a benefit to the Knights of the Ku Klux Klan because of the Knights' discriminatory practices, and granting the application would confer such a benefit in contravention of federal law. [4] Executive Order 94-03 prohibits state agencies from allowing discriminatory practices on state facilities and prohibits contracting with an organization that discriminates, and, therefore, prohibits the Knights of the Ku Klux Klan from participating in this program. [5] The district has placed a moratorium on adoptions on interstate highways within the City of St. Louis.

Letter from Stephen Knobbe to Michael Cuffley (Aug. 14, 1997). This time the Klan filed suit. On cross motions for summary judgment, the District Court granted summary judgment for the Klan. See Cuffley v. Mickes, 44 F. Supp. 2d 1023 (E.D. Mo. 1999) (Cuffley II). We now have a "concrete record for judicial consideration" and can decide the issues pressed before us. Cuffley I, 112 F.3d at 1338.

II.

We review a summary judgment decision de novo.[2] "The party seeking summary judgment must establish the absence of a genuine issue of material fact and his entitlement to judgment as a matter of law." Artis v. Francis Howell N. Band Booster Ass'n, 161 F.3d 1178, 1180 (8th Cir. 1998) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)). We may affirm the decision of the District Court on any basis supported by the record. See id.

We believe the undisputed facts conclusively demonstrate that the State unconstitutionally denied the Klan's application based on the Klan's views.[3]

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[2] After de novo review of the State's argument that, based on a case from the Fifth Circuit, the Klan is collaterally estopped from arguing that its constitutional rights are violated by a state's refusal to allow them to adopt a highway, we entirely agree with the analysis of the District Court on this issue. See Cuffley II, 44 F. Supp. 2d at 1026 n.2. In Texas v. Knights of the Ku Klux Klan, 58 F.3d 1075 (5th Cir. 1995), the Fifth Circuit did not decide that the Klan had no right to adopt a highway. Instead, that court concluded that the state's reason for denying the Klan's application to adopt a portion of highway outside a public housing project—to prevent the Klan from intimidating residents and frustrating a federal desegregation order—were reasonable and viewpoint neutral. Here, the State does not argue that the Klan's adoption of the highway will have such an effect. And like the Fifth Circuit, we do not decide whether the Klan has the right to adopt a highway. We only decide that the State may not deny the Klan's application to adopt a highway based on the Klan's views.

[3] The District Court summarily disposed of the Klan's claim that the State violated the Equal Protection Clause by "conditioning" access to the Adopt-A-Highway program based on the applicant's views. The Klan filed a cross appeal to preserve this issue. Whether this claim arises under the Equal Protection Clause or the First-Amendment, it is clear that the State may not deny access to the

From the very beginning of this controversy when the Klan first applied to adopt a highway in May 1994, the State treated the Klan differently from the vast majority of applicants. The deposition of Stacy Armstrong, the statewide coordinator for the Adopt-A-Highway program and designated to speak on behalf of the State in the initial litigation, is remarkable for its candor in this regard.

> Q. . . . Now, somebody at some point must have made a decision that this was the kind of case, this Klan application was the kind of case, that must be referred for special treatment, whether it be by higher-ups or it be by the court to make a decision; right?
> A. Right.
> . . .
> A. The Adopt-A-Highway coordinator for the district called me. . . .
> Q. Now, is it fair to say that his calling you about an individual application to ask your guidance as to what to do is something that's out of the ordinary?
> . . .
> A. I'd say yes.

Adopt-A-Highway program based on the applicant's views. Thus, unlike the District Court's decision in this case and this Court's decision in Knights of Ku Klux Klan, Realm of Missouri v. Curators of the University of Missouri, __ F.3d __, 2000 WL 189834 (8th Cir. Feb. 17, 2000), we need not discuss whether the Klan is "speaking" for the purposes of the First Amendment or whether the Adopt-A-Highway program is a public forum. Moreover, the issues we face here are fundamentally different than those discussed in this Court's recent decision that a publicly-owned radio station is not obligated to accepted the Klan's sponsorship of a National Public Radio program. That case rested largely on the unique context of public broadcasting, in which editorial discretion to select programming and sponsors looms large. And unlike this case, the radio station had legitimate reasons for its refusal to accept the Klan's sponsorship, and there was absolutely no showing of viewpoint discrimination.

Q. It connotes a special situation?
A. Right.

Deposition of Stacy Armstrong at 57-59 (Apr. 12, 1995). And it is undisputed that this disparate treatment was based on the State's perception of the Klan's beliefs.

Q. And what is it about the Klan application that he considered to be a special situation?
A. It was just who it was from and what they wanted on the sign.
Q. It had to do with what he perceived to be their beliefs?
A. As a group, yes.
Q. And what they were advocating?
A. Right.
. . .
Q. And that the basis for your decision to treat this organization's application for further review was based on your perception of what the group believed and what they advocated?
A. Right.

Id. at 59-61. There are repeated admissions from the State's designee on these points, including the surprising admission that the State thinks it has the right to deny an application on the basis of the applicant's beliefs.

Q. So you believe as part of your job that you should examine a group's beliefs to see if there's something about what they believe in and what they advocate to see if they may be qualified or disqualified from the program?
A. I think that we have a right to look at what they stand for and what they believe.
Q. And if they don't stand for something that is acceptable to the department, you believe that you can disqualify them from the program; is that correct?
. . .
A. . . . I think the department has the right to deny somebody.

Q. On the basis of their beliefs?

A. On the basis of their beliefs, yes.

Id. at 19-20.

The State since has filed a "curative" affidavit from Armstrong. Armstrong now maintains that the State does not consider the beliefs of the applicant, but simply applies Adopt-A-Highway program regulations to determine whether an applicant is eligible to adopt.[4] We do not believe, however, that

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[4] These regulations were filed and became effective in 1995 while the first action was pending and after Armstrong's original deposition. The regulations provide in relevant part:

> (1) Eligible Adopters. Eligible adopters include civic and nonprofit organizations, commercial and private enterprises and individuals. The program is not intended as a means of providing a public forum for the participants to use in promoting name recognition or political causes. The commission reserves the right to limit the number of adoptions for a single group.
>
> (2) Acceptance of Application. The commission will have sole responsibility in determining whether an application is rejected or accepted and determining what highways will or will not be eligible for adoption.
>
> (A) The commission may refuse to grant a request to participant if, in its opinion, granting the request would jeopardize the program, be counterproductive to its purpose or have undesirable results such as increased litter, vandalism or sign theft.
>
> (B) Applicants must adhere to the restrictions of all state and federal nondiscrimination laws. Specifically, the applicant must not discriminate on the basis of race, religion, color, national origin or disability. Such discrimination disqualifies the applicant from participation in the program.
>
> (C) Applicants with a history of unlawfully violent or criminal behavior will be prohibited from participation in the program.

Armstrong's deposition evinces the kind of mistake and confusion necessary to allow her contradictory affidavit to create an issue of fact on these points. See Camfield Tires, Inc. v. Michelin Tire Corp., 719 F.2d 1361, 1365-66 (8th Cir. 1983). Accordingly, we reject her affidavit and conclude that there is no question that the State treated the Klan differently from the vast majority of applicants based on the State's perception of the Klan's beliefs and advocacy.

To be sure, a justification for further review of an application does not necessarily equate with the justification for denial of an application. Nevertheless, absent a convincing and constitutional reason for the denial, the evidence leaves us with but one conclusion: that the State denied the Klan's application based on the Klan's beliefs and advocacy. For the last fifty years, the Supreme Court has made it clear that such a denial is unconstitutional:

> [E]ven though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Such interference with constitutional rights is impermissible.

Mo. Code Regs. Ann. tit. 7, § 10-14.030 (1995).

Perry v. Sindermann, 408 U.S. 593, 597 (1972) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958) (alteration in Perry)).[5]

As we have noted, in its letter to the Klan, the State offered five reasons to support its denial of the application. We need not address the State's fifth purported reason, the moratorium within the City of St. Louis, because the Klan amended its application to adopt a stretch of Interstate 55 south of the City of St. Louis. Accordingly, this aspect of the controversy is now moot. We discuss the State's first four reasons below.

The State's first purported reason for denying the Klan's application essentially amounts to the State's contention that the Klan does not satisfy one of the regulations issued by the State shortly after the Klan first submitted its application: "Applicants must adhere to the restrictions of all state and federal nondiscrimination laws. Specifically, the applicant must not discriminate on the basis of race, religion, color, national origin or disability. Such discrimination disqualifies the applicant from participation in the program." Mo. Code Regs. Ann. tit. 7, § 10-14.030(2)(B). There is no question that the Klan discriminates in membership on the basis of race, religion, color, and national origin. The question is whether any state or federal nondiscrimination law applies to the Klan. The State does not point to any specific nondiscrimination law that the Klan is

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[5] This "unconstitutional conditions" doctrine is not limited to valuable government benefits or even benefits at all. The Supreme Court has held that a legal entitlement to a position or program is not necessary in order to assert an unconstitutional conditions claim. See Rutan v. Republican Party, 497 U.S. 62, 72 (1990) (citing Perry, 408 U.S. at 596-98). At least two circuits have applied this analysis to volunteer governmental positions. See Andersen v. McCotter, 100 F.3d 723, 727 (10th Cir. 1996); Hyland v. Wonder, 972 F.2d 1129, 1135 (9th Cir. 1992), cert. denied, 508 U.S. 908 (1993).

violating.[6] Even assuming the existence of such a law, we think its direct application to the Klan in this case would violate the Klan's freedom of political association. There seems little question that requiring the Klan to accept non-"Aryans" would significantly interfere with the Klan's message of racial superiority and segregation. Cf. New York State Club Ass'n v. City of New York, 487 U.S. 1113 (1988) ("It is conceivable, of course, that an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion."); Board of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 548 (1987) (considering whether "admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes"); Roberts v. United States Jaycees, 468 U.S. 609, 627 (1984) (considering whether "admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are not permitted to vote"); but cf. Runyon v. McCrary, 427 U.S. 160, 176 (1976) ("[I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable . . . . But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle.").

Requiring the Klan essentially to alter its message of racial superiority and segregation by accepting individuals of other races, religions, colors, and national origins in order to adopt a highway would censor its message and inhibit its constitutionally protected conduct. We find Invisible Empire of the Knights of Ku Klux Klan v. Mayor of Thurmont, Md., 700 F. Supp. 281

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[6] In its letter to the Klan, the State cited Title VI of the Civil Rights Act of 1964 and Missouri Executive Order 94-03 as separate reasons for denying the Klan's application. We discuss those reasons below.

(D. Md. 1988), persuasive in this regard. In Thurmont, the court held that a town's nondiscrimination condition on public parades violated the Klan's freedom of expressive association. The court surveyed the trilogy of Supreme Court private association cases cited above and concluded:

> If ever there was a case where the membership and the message were coextensive, it is here. . . . The KKK has nothing to do with the distribution of goods and services, nor with business contacts or advantages. The group's primary purpose is to advocate one main concept—that blacks and whites should not mix. Allowing blacks to march with the KKK would change the primary message which the KKK advocates.

Id. at 289.

The State's response to Thurmont, and indeed, one of its broader arguments, is that, unlike in Thurmont where the Klan would simply march along a public street, here the State would enter into some kind of "prohibited" relationship with the Klan. As we understand its argument, the State fears that it would violate the Fourteenth Amendment by allowing the Klan to adopt a highway. The State cites Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), for the proposition that discrimination by a group associated with the State is, in effect, discrimination by the State and thus meets the state action requirement of the Fourteenth Amendment. But even Burton does not extend so far as to reach the relationship at issue here. In Burton, the Supreme Court found state action when a private coffee shop, operating within a publicly owned building, refused service to a black customer. What we have here, however, is more like a State owned coffee shop offering service to a group of customers who want a table for only their white friends.[7] The

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[7] Even this analogy is too favorable to the State's position. At oral argument, the State. admitted that, subject to safety restrictions, anyone can pick up trash along Missouri highways, including

state action doctrine does not extend so far. The State simply cannot condition participation in its highway adoption program on the manner in which a group exercises its constitutionally protected freedom of association. Accordingly, we conclude that this reason for refusing participation, like the viewpoint reason admitted in deposition, constitutes an unconstitutional condition on the Klan's participation in the Adopt-A-Highway program.

The State's second purported reason, that the Klan has a history of unlawfully violent and criminal behavior, is based on another of the State's new regulations: "Applicants with a history of unlawfully violent or criminal behavior will be prohibited from participation in the program." Mo. Code Regs. Ann. tit. 7, § 10-14.030(2)(C). All of the evidence, however, supports the Klan's contention that this reason is pretextual.

As we read the regulation, anyone who has ever committed any criminal act, from murder and mayhem to joyriding and jaywalking, is ineligible to participate in the program. Were the State actually to enforce this regulation with any regularity, we have little doubt the Adopt-A-Highway program would soon have few adopters. Recognizing this problem, the State is not really sure how the regulation should be applied:

> Q. All right. Well, tell me what criminal behavior is?
> A. Criminal behavior is behavior that violates the law.
> Q. Any law?
> A. I would say, that is what it would intend.
> Q. Have you ever gotten a ticket for speeding?
> A. No, I haven't, but I wouldn't call that a history.
> Q. Well, it says—all right. If you've got 10 tickets for speeding, would that be a history?
> A. It would depend on the time frame.

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highways adopted by others. That is, the Klan's adoption of a highway does not in any way prohibit others from cleaning along that portion of the highway.

Q. Okay. Drunk driving? DWI? BAC?
A. I'm not sure that would. It could.
Q. It could. Depending on?
A. I can't give you a criteria.
Q. How about antitrust? Archer Daniels Midland pleaded guilty to criminal antitrust violations, federal criminal antitrust violations. Are they excluded from adopting a highway?
A. I would say if there was any question, I would seek legal counsel on it.

Deposition of Joseph A. Mickes at 52 (Mar. 20, 1998) (emphasis added). That the State does not know how the regulation applies in practice to the Adopt-A-Highway program is not surprising because the State has never applied the regulation to anyone other than the Klan. Even though the regulation became effective in July 1995, barely a year after the Klan filed its application, the State has never asked an applicant a single question about criminal history, has never done a single investigation of criminal history, and has no idea whether any of the participants in the program have such a history. At oral argument, the State backed further away from the incredible breadth of the regulation, arguing that it was intended to address violent criminal behavior such as that committed by the Klan in the past. The State's argument makes even clearer what was already obvious: that this regulation was intended to target only the Klan and its views.

The State's third purported reason for denying the Klan's application is that allowing the Klan to participate in the Adopt-A-Highway program would violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1994), and could cause the State to lose federal highway funding. Under Title VI., "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Id.; see also id. § 2000d-4a (defining "program or activity" to

include all operations of State government departments); id. § 2000d-1 (authorizing termination of federal funding for programs that violate Title VI).

Title VI clearly does not apply directly to prohibit the Klan's discriminatory membership criteria. The Klan is not a direct recipient of federal funds nor are federal funds earmarked for the Klan. See National Collegiate Athletic Ass'n v. Smith, 525 U.S. 4595 468 (1999) ("Entities that receive federal assistance, whether directly through an intermediary, are recipients within the meaning of Title IX; entities that only benefit economically from federal assistance are not."). There is not even an allegation here that the State pays for the Adopt-A-Highway program with ear-marked federal funds. The Klan thus is not subject to Title VI.

The question remains, however, whether Title VI prohibits the State from allowing the Klan to participate in the Adopt-A-Highway program. Under U.S. Department of Transportation regulations, the State, as a recipient of federal funds, "may not, directly or through contractual or other arrangements, on the grounds of race, color, or national origin . . . [d]eny a person an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program." 49 C.F.R. § 21.5(b)(1)(vi) (1999). The United States, as amicus curiae, argues that, in allowing the Klan to adopt a highway, the State would violate the regulatory prohibition on any arrangement that bars individuals from participating in a program on the basis of race. In essence, the United States argues that allowing the Klan to adopt a portion of highway would deny other people an opportunity to pick up litter on that portion of the highway on the same terms as the Klan. Once again, we note that the Klan's adoption of a highway does not in any way prohibit others from cleaning along that portion of the highway. But more to the point, we believe the United States interprets the "program" at issue too narrowly. Neither the Klan nor the State would operate a subprogram on the Klan's adopted stretch

of highway; instead, the Klan simply would be one of many participants in the overall Adopt-A-Highway program. So long as the State does not deny anyone an opportunity to adopt a highway on an improper basis, the State does not violate Title VI. The Klan, as one of many voluntary participants in the program, is free to determine its own membership.

The State's fourth purported reason for denying the Klan's application is that the State would violate Article VII of the State's Executive Order 94-03 (Jan. 14, 1994) by allowing the Klan to adopt a highway. That Order provides:

> Every department shall offer its services to the public without discrimination. No State facility shall be used to promote any discriminatory practice, nor shall any department become a party to any agreement which permits any discriminatory practice prohibited by this order, state or federal law.

First, as we described above in the Title VI context, offering a service to a group that discriminates is not equivalent to discrimination in the offering of that service. Second, the State admitted repeatedly in depositions that it does not view the erection of an Adopt-A-Highway sign as an endorsement or promotion of the adopter. In fact, the State's own regulations, conveniently drafted after the Klan applied, provide that " [t]he program is not intended as a means of providing a public forum for the participants to use in promoting name recognition or political causes." Mo Code Regs. Ann. tit. 7, § 10-14.030(l) (emphasis added). Third, the State does not point to any part of the Order or any state or federal law that prohibits the Klan from discriminating in its membership criteria. Accordingly, Executive Order 94-03 does not prohibit the State from allowing the Klan to adopt a highway, and the State's fourth and last reason fails.

Not only do the State's discrimination-related reasons not make sense, but there is also evidence that, like the criminal-history reason, these three reasons are entirely pretextual. The

State admitted repeatedly in deposition testimony that it does not ask organizations that apply to the program about their membership criteria nor does it investigate the applicants' membership criteria. Instead, the State claims to rely solely on common knowledge. But the State has never denied the application of any other group on the grounds of discriminatory membership. A quick glance down the list of participants in the Adopt-A-Highway program, however, reveals many adopters that have discriminatory membership criteria. For example, it is commonly known that the Knights of Columbus, a venerated service organization that has chapters adopting many stretches of highway across the State, limits its membership to Catholic men.[8] Once again, the State's actions speak louder than its words.

The State's purported reasons for denying the Klan's application are so obviously unreasonable and pretextual that, in the end, we are left only with the admitted reason the State was motivated to so carefully scrutinize the Klan's application as an explanation for the denial: that the State disagrees with the Klan's beliefs and advocacy. Nevertheless, the First Amendment protects everyone, even those with viewpoints as thoroughly obnoxious as those of the Klan, from viewpoint-based discrimination by the State. "Such interference with constitutional rights is impermissible." Perry, 408 U.S. at 597.

There are better ways of countering the Klan's repellent philosophy than by the State's engaging in viewpoint-based discrimination. In a myriad of constitutionally sound ways, state officials and private citizens alike may oppose the Klan's racially divisive views and express disapproval of those views in the strongest terms. But viewpoint-based exclusion of any

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[8] During deposition testimony and at oral argument, the State maintained that the membership criteria of the Knights of Columbus did not violate its regulations because "anyone could become Catholic." We think this argument requires no response.

individual or organization from a government program is not a constitutionally permitted means of expressing disapproval of ideas—even very poor ideas—that the government disfavors. We affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FILED
APRIL 13, 1999

MICHAEL CUFFLEY AND THE KNIGHTS OF THE KU KLUX KLAN, Plaintiffs

v.

JOE MICKES, ET AL., Defendants

Case No. 4:97CV2110-SNL

MEMORANDUM AND ORDER

This matter is before the Court on Defendants' Motion for Summary Judgment (#16) filed November 16, 1998, and Petitioners' Motion for Summary Judgment (#23) filed December 31, 1998. The facts in this case have never truly been in dispute. Rather, the parties have come to this Court twice for a ruling as a matter of law on whether or not the Missouri Highway Transportation Commission (MHTC) may deny the so-called Knights of the Ku Klux Klan (Klan) the opportunity to pick up garbarge on the side of a Missouri highway as part of the Adopt-a-Highway (AAH) program.[1]

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[1] The AAH program is described in detail in Missouri, ex rel., Missouri Highway & Transp. Comm'n v. Cuffley, 927 F.Supp 1248 (E.D. Mo. 1996).

Summary Judgment Standard

Courts have repeatedly recognized that summary judgment, like dismissal, is a harsh remedy that should be granted only when the moving party has established his right to judgment with such clarity as not to give rise to controversy. New England Mut. Life Ins. Co. v. Null, 554 F.2d 896, 901 (8th Cir. 1977). Summary judgment motions "can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial time for those that really do raise genuine issues of material fact." Mt. Pleasant v. Assoc. Elec. Coop., Inc., 838 F.2d 268, 273 (8th Cir. 1988). But there must be absolutely "no genuine issue as to a material fact and the moving party [must be] entitled to judgment as a matter of law." Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 467, 82 S Ct. 486, 488 (1962).

In passing on a motion for summary judgment, the court must review the facts in a light most favorable to the party opposing the motion and give that party the benefit of any inferences that logically can be drawn from those facts. Buller v. Buechler, 706 F.2d 844, 846 (8th Cir. 1983). The court is required to resolve all conflicts of evidence in favor of the nonmoving party. Robert Johnson Grain Co. v. Chem. Interchange Co., 541 F.2d 207, 210 (8th Cir. 1976). With these principles in mind, the Court will now turn to the facts which have largely remained unchanged since the last time these parties were in this Court.

Background

The controversy between these parties began on May 31, 1994, when Michael Cuffley, as the local Klan's "Unit Recruiter" filed an application to participate in the AAH program by adopting a portion of Interstate Highway 55 between Utah and Gasconade within the city of St. Louis. See Missouri, ex rel., Missouri Highway & Transp. Comm'n v. Cuffley, 927 F.Supp 1248, 1252 (E.D. Mo. 1996) (Cuffley I). At that time, the MHTC had no formal written administrative

regulations that governed the AAH program. Rather than approving or denying Cuffley's application on behalf of the Klan, the MGTC opted to file a federal declaratory judgment action on behalf of the state of Missouri to determine whether or not they could legally deny the application.

The District Court in Cuffley I determined that the AAH program was either a limited public forum or a non-public forum, and that the MHTC excluded the Klan from the program because of viewpoint discrimination. On appeal, the Eighth Circuit Court of Appeals held that the federal court had not subject matter jurisdiction to rule on a declaratory judgment action filed by a state to determine the Constitutionality of its own actions. Missouri, ex rel., Missouri Highway & Transp. Comm'n v. Cuffley, 112 F.3d 1332, 1336-37 (8th Cir. 1997). Furthermore, the Eighth Circuit found that the issue decided by the District Court was not yet ripe because the MHTC had never denied the Klan's application. Id., 112 F.3d at 1338. The Eighth Circuit vacated the District Court's judgment in favor of the Klan, and ordered the case remanded with instructions to dismiss.

During the pendency of the Cuffley I litigation, the MHTC adopted certain regulations governing future adoptions. First, the MHTC will not allow any organization which discriminates against individuals on any illegal grounds under state or federal law to adopt a highway. Mo. Code Regs. Ann. tit. 7, § 10-14.030(2)(B). Second, the MHTC will not allow any organization with a history of unlawfully violent or criminal behavior to adopt a highway. Mo. Code Regs. Ann. tit. 7, § 10-14.030(2)(C). Third, the District Engineer of the Metro St. Louis District of the Missouri Department of Transportation (MoDPO) imposed a moratorium on all new adoptions of interstate highways within the city limits of St. Louis in order to prevent an expansion of the number of people on the sides of the roads. Knobbe Deposition, 11-12, 14.

After the dismissal of Cuffley I the MGTC denied the Klan's application on the stated grounds that the Klan violated state and federal discrimination laws, the Klan had a history of violent lawlessness, and that the MHTC was no longer allowing anyone to adopt highways with the city of St. Louis. See Petitioners' Exhibit 4, Denial Letter of August 14, 1997. The Klan then filed this lawsuit under 42 U.S.C. § 1983, claiming that the MHTC had denied it of the equal protection of the laws, and also deprived it of its First Amendment right to free speech. The Klan sought to enjoin the Chief Engineer of the MoDot, the members of the MHTC, and the District Engineer of MoDot's Metro St. Louis District from denying the Klan's application to participate in the AAH program.

Defendants put forth two arguments in support of their entitlement to summary judgment. First, they argue that the Klan is collaterally estopped from asserting its right to participate in the AAH program by the decision of the Fifth Circuit Court of Appeals in State of Texas v. Knights of the Ku Klux Klan, 58 F.3d 1075 (5th Cir. 1995). Second, they argue that any speech involved in the AAH program is the MHTC's speech, and therefore the program creates no First or Fourteenth Amendment Rights in the Klan.

The Klan relies on three different arguments in its own motion for summary judgment. First, the Klan argues that the MHTC's denial of its application to participate in the AAH program deprives it of equal protection under the law by basing the Klan's entitlement on the surrender of certain Constitutional rights to free speech. Second, the Klan argues that the regulations adopted by the MHTC deprive the Klan of its right to due process as the regulations are so vague and unclear that they create unfettered discretion in the officials charged with applying them and that their application to the Klan was arbitrary and capricious. Third, the Klan argues that the MHTC's denial of the Klan's application constituted unlawful "viewpoint discrimination" in violation of the First and Fourteenth Amendments.

Discussion

The Court does not believe any entitlement to be at issue in this case, nor does their appear to be any attempt by the State to force the Klan to change its offensive views. Rather, this case appears to be a straight-forward denial of access. Therefore the Court will deny Petitioners' Motion for Summary Judgment on the Equal Protection and Due Process grounds. Instead, the Court will directly address the substantive issue of First Amendment speech as in Cuffley I. For the most part, the Court agrees with the excellent reasoning stated by the District Court in Cuffley I. The Klan's desired participation in the AAH program is indeed speech protected under the First Amendment. See Cuffley I, 927 F. Supp. at 1254-55. For the same reasons, stated in Cuffley I, this Court rejects the MHTC's argument that the speech involved in the AAH program is MHTC's speech.[2]

Although the speech analysis in this matter has not changed, the Court disagrees somewhat with the forum analysis in Cuffley I. Without expressly deciding the question, the District Court in Cuffley I stated some disagreement with the Fifth Circuit's conclusion that the Adopt-a-Highway program in

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[2] This Court also rejects defendants' collateral estoppel argument. Even assuming that defendant could prove privity between the Klan group involved in this controversy and that involved in the Texas litigation, the issues in this case are completely distinct from those in the Texas case. The Fifth Circuit did not decide, as defendants argue, that the KKK has no right to participate in any Adopt-a-Highway program. Rather, the Fifth Circuit decided that the Adopt-a-Highway program was a nonpublic forum, and that under the specific facts of that case, where the Klan desired to have the state place a sign bearing the Klan's name directly in front of an integrated housing project which the Klan had been enjoined from picketing, the state had reasonable and viewpoint neutral grounds for denying the Klan's application. 58 F.3d at 1079-81. In no way can that holding be read so broadly as to limit all rights the Klan might have to participate in AAH programs everywhere.

Texas constituted a nonpublic forum. The District Court in Cuffley I believed, contrary to the Fifth Circuit opinion, that the forum involved was probably the roadside and not the AAH program itself. 927 F. Supp. at 1257. The District Court distinguished the situation in Missouri because it found no intent by the Klan here to have its name presented under the imprimatur of the state. Rather, the Court in Cuffley I found that the MHTC had opened the sides of the roads generally to any group wishing to pick up litter and to project an image of itself as altruistic and environmentally conscious. 927 F. Supp. at 1258. The Klan had just as much right to portray itself as such as any other group.[3] Thus, the Court concluded that the AAH program in Missouri most likely constituted a designated public forum.

At this time, in light of the MHTC's subsequent attempts to limit access to the program, the Court finds that the MHTC attempted to create a nonpublic forum rather than a designated public forum. Because the exact forum involved in this case is difficult to identify, it may be easiest to define what the forum is by discussing what it is not. The shoulders of interstate highways are certainly not traditional public fora, such as parks and street corners where people have traditionally gathered to present, share and exchange ideas. See Cornelius v. N.A.A.C.P. Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 802, 105 S. Ct. 3439 (1985). Nor has the MHTC, at this time, designated the roadsides as public fora. A designated public forum is a location or channel of communication designated by the government for use by the public at large for assembly and speech, for use by certain speakers or for the discussion of certain subjects. Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45-46, 103 S. Ct. 948, 955 (1983).

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[3] Apparently, the Klan is attempting to rehabilitate its membership's generally held public image as hate-mongering, night-riding, cowardly thugs.

The Court finds that the MHTC does not presently intend to open the shoulders of the Missouri state and interstate highway system for the purposes of traditional discourse. Rather, the MHTC has developed a scheme to have litter removed from the roadways cheaply by utilizing free labor. This program creates an extremely narrow outlet for ancillary expression, strictly limited to the participant's name and the fact of his, her or its participation. The MHTC maintains tight control over both the program itself and the attendant opportunity for expression it creates. The MHTC provides the garbage bags for the volunteers, it tells them how often they must clean the highway, and it strictly limits what they may put on the signs which the MHTC erects in recognition of their efforts. The state maintains strict control over both the method of speech (placement of the sign and the act of participation) and the message itself (the simple fact of the group's participation in the program).

These policies represent legitimate safety concerns and the MHTC's insistence on maintaining independence from association with the political, social or commercial interests of the program's participants. Under these circumstances, the Court concludes that the MHTC has in no way designated either the AAH program or the sides of the highways generally as public fora. However, as the MHTC does allow the very limited expressive activity discussed above to accompany participation, the program does constitute a forum, but a nonpublic one. See Cornelius, 473 U.S. at 806, 105 S. Ct. at 3451.

Having concluded that this case involves a nonpublic forum, the Court must now address the regulations imposed by the MHTC. Access to nonpublic fora can be restricted as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's view. Cornelius, 473 U.S. at 800, 105 S. Ct. at 3448. The Court will now address each of the three regulations relied upon by the MHTC in denying the Klan's application to participate in the AAH program.

The MHTC first relies upon its nondiscrimination policy. The state denies participation to any organization who fails to adhere to the restrictions of all state and federal nondiscrimination laws. Mo. Code Regs. Ann. tit. 7, § 10-14.030(2)(B). Specifically, the applicant must not discriminate on the basis of race, religion, color, national origin or disability. Such discrimination disqualifies the applicant from participation in the program. The stated purpose of the rule, that bestowing a benefit upon a organization which discriminates unlawfully may place MHTC at risk of forfeiting federal funding, appears reasonable enough to the Court. The regulation need not be the only reasonable regulation nor even the most reasonable regulation. Cornelius, 473 U.S. at 808, 105 S. Ct. at 3452.

However, simply because the MHTC has adopted a reasonable regulation does not make its application viewpoint neutral. In this case, the MHTC stated as its reason for denying the Klan's application the fact that the Klan discriminates on the bases of race, religion, color and national origin. Specifically, the MHTC asserted in its rejection letter to the Klan that the Klan's policies violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (Title VI). Title VI states that "[n]o person in the United States shall, on the ground of race, color, or national original, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Therefore, in order to violate Titlle VI, the Klan would have to be responsible for depriving some person access to a program or activity receiving Federal financial assistance, as defined in 42 U.S.C. § 2000d-4a.

The MHTC has identified no program or activity to which the Klan controls access. The Klan itself is certainly not a program or activity as defined in the statute. Therefore, the MHTC has not identified any violation of Title VI by the Klan which would under the Klan ineligible to participate in the AAH program under the MHTC's own guidelines. Nor has the MHTC identified any violation of Executive Order 94-03 by the

Klan. The Klan certainly has discriminatory membership criteria. However, as the Klan points out, so do many of the other private organizations which participate in the AAH program, such as the Boy Scouts of America and the Knights of Columbus. None of those membership requirements violate any state or federal non-discrimination laws to the Court's knowledge. As the MHTC has presented no basis for rejecting the Klan's application based on its nondiscrimination policies, it is left with its regulation justification for denying the Klan's application: that the Klan believes in racial segregation and white supremacy.

Regardless of how obviously flawed and unfortunate the Klan's beliefs may be, the MHTC may not base its decision to exclude the Klan from the AAH program on those beliefs. The Court concludes that the MHTC's reliance upon its nondiscrimination policies in reaching the decision to deny the Klan's application to participate in the AAH program was actually an effort to suppress the Klan's First Amendment right to espouse unpopular and indeed morally and intellectually repugnant ideas. Therefore, that justification cannot withstand applicable First Amendment scrutiny, and the Klan's motion for summary judgment must be granted on that issue.

The second asserted regulation relief upon by the MHTC states that "Applicants with a history of unlawfully violent or criminal behavior will be prohibited from participation in the program." Mo. Code Regs. Ann. tit. 7, § 10-14.030(2)(C). That regulation fails to meet the first criterium for regulation of speech in nonpublic fora: that the regulation be reasonable. MHTC has asserted no rational basis for that regulation, nor can the Court conceive of any for the particular language adopted by the MHTC. In fact, the Court has no clear idea what that regulation means nor how it could ever be interpreted in such a way as to limit the discretion of whatever government official was charged with applying it. It is not clear whether the regulation applies only to behavior that has been juducially determined "criminal" or whether it applies to all unlawful

behavior generally. The Court doubts that the incredibly broad spectrum of action which could potentially fall into the latter category could be reasonably regulated by any commission, but under the facts present here, the policy certainly lacks sufficient specificity to be useful.

There are certainly justifiable reasons for disqualifying certain criminals from participating in some state sanctioned activities. However, in those cases, the government strictly limits exactly what the convicted criminal forfeits and why. Here, none of the MHTC officials questioned about the meaning of Section 10-14.030(2)(C) expressed any greater understanding than the Court has. Accordingly, that regulation fails the test of reasonableness demanded by the First Amendment. Petitioners' Motion for Summary Judgment should be granted on that regulation as well.

Finally, the Court will address the MHTC's moratorium on interstate highway adoptions within the St. Louis city limits. The Court finds that to be a reasonable and viewpoint neutral regulation. The MHTC stated that the purpose for ceasing all additional highway adoptions inside the St. Louis city limits was to increase safety on busy urban highways. While the Court recognizes that this might not be the most effective way to increase safety, it is a reasonable one. See Cornelius, 473 U.S. at 808, 105 S. Ct. at 3452. The Klan may still adopt a highway in any location within the state not affected by the moratorium. The Klan may also express its alleged philosophy of environmental consciousness in any other appropriate manner.[4]

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[4] The Court notes the Klan's apparent failure to propound its "green" message in any other manner whatsoever than through the AAH program. This casts some doubt on the sincerity of the Klan's expressed desire to beautify Missouri's roadsides. However, the government may not dictate by which manner an organization chooses to communicate its platform whether or not that platform is sincerely embraced.

The moratorium is also viewpoint neutral. The Klan does not dispute that the moratorium has been applied generally to prevent highway adoptions without regard to the viewpoint of any applicant. Accordingly, the Klan's motion for summary judgment will be denied on this point, and judgment will be entered in favor of the MHTC insofar as they asserted that the moratorium was constitutionally permissible. As the record reflects that, as of this time, the Klan has applied to adopt no other stretch of highway than "both sides of I-55 in St. Louis from ½ mile south of Utah to Gasconade" the injunction will be denied.

Conclusion

This opinion should not be read in any way as validating the Klan or endorsing its repugnant views. In fact, this entire lawsuit offends the policies underlying Section 1983, the statutory basis for the Klan's claim. Section 1983 was originally enacted as Section 1 of the Ku Klux Act of April 20, 1870. See Monroe v. Pape, 365 U.S. 167, 171-186, 81 S. Ct. 473, 475-483 (1961) (discussing the legislative history of the statute currently codified at 42 U.S.C. § 1983). It was part of a comprehensive package of legislation designed to end the Klan's practice of systematically depriving black Americans of the rights of citizenship under color of state law in the Reconstruction South by dominating state governments. The Court cannot escape the bitter irony in the fact that the Klan should now seek shelter for those same views of hatred and superiority under the very statute that Congress passed to end the Klan's unsavory influence.

As lacking as the Klansman's ideology may be of any redeeming social, intellectual or spiritual value, the Constitution of the United States protects his right to express that ideology as freely as one whose views society embraces. The MHTC cannot use its regulations to target the Klan's unfortunate beliefs. However, the MHTC also retains the right to regulate their own nonpublic forum in a manner that is reasonable and

viewpoint neutral. The MHTC has established a reasonable and neutral moratorium on interstate highway adoptions in the City of St Louis which reflect legitimate safety concerns. The Klan's right to participate in the program does not trump the MHTC's discretion in those regards. However, in applying its nondiscrimination regulation with no evidence of unlawful discrimination by the Klan, the MHTC violates the Klan's First Amendment rights. Similarly the vague prohibition of participation by those with histories of unlawful violence or criminal behavior cannot be reasonably or neutrally enforced by the MHTC.

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment (#16) is **DENIED**.

IT IS FURTHER ORDERED that Petitioners' Motion for Summary Judgment (#23) is **GRANTED** in part.

IF IS FURTHER ORDERED that the Chief Engineer of MoDot, the members of the MHTC, and the District Engineer of MoDot's Metro St. Louis District, in their official capacities, are **HEREBY ENJOINED** from denying the application of the Knights of Ku Klux Klan, Realm of Missouri to participate in the Adopt-a-Highway program on the bases of title 7, Missouri Code of Regulations Section 19-14.03(2)(B)-(C) as discussed in the preceding Memorandum.

IT IS FURTHER ORDERED that the application of the Knights of the Ku Klux Klan, Realm of Missouri to participate in the Adopt-a-Highway program was properly denied by letter of August 14, 1997, for the stated reason of a reasonable and viewpoint neutral moratorium on adoptions of highways within the city limits of St. Louis, Missouri.

IT IS HEREBY FINALLY ORDERED, ADJUDGED AND DECREED that this matter is **DISMISSED** with prejudice except to the extent that this Court retains jurisdiction to enforce the above described injunction under 42 U.S.C. § 1983.

Dated this 13th Day of April, 1999.

/s/ Stephen N. Limbaugh
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

May 22, 2000

No. 99-2334EMSL
No. 99-2501EMSL

MICHAEL CUFFLEY; KNIGHTS OF THE KU KLUX KLAN, REALM OF MISSOURI, Appellants

vs.

JOE MICKES, in his official capacity as Chief Engineer of the Missouri Department of Transportation, et al., Appellees

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Order Denying Petition for Rehearing and for Rehearing En Banc

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The petition for rehearing en banc is denied. Judge McMillian and Judge Murphy would grant the petition. The petition for rehearing by the panel is also denied.

(5128-010199)

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit.

Supreme Court, U.S.
FILED
SEP 18 2000
CLERK

(2)

No. 00-0289

IN THE
SUPREME COURT OF THE UNITED STATES

Yarnell, J.T. etc., et al.,

Petitioners

v.

Cuffley, Michael, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT

Petitioners disregard the specific factual basis for the decision below, which is wholly independent of the constitutional issues they raise.

The Court of Appeals held that "the undisputed facts conclusively demonstrate that [Missouri] unconstitutionally denied the Klan's application based on the Klan's views." Petition, p.4a. The Eighth Circuit found as a factual matter that the Missouri nondiscrimination justification is "obviously unreasonable and pretextual", *Id.*, because the regulations were selectively targeted to the Klan and not applied to other similarly situated program participants. *Id.* Resolution of the constitutionality of Missouri's asserted nondiscrimination justification is unnecessary to the decision of the case. Petitioners' petition is nothing more than a request for an advisory opinion.

MISSOURI ADMITS THAT IT TREATED THE KLAN'S APPLICATION DIFFERENTLY BECAUSE IT DISLIKES THE KLAN'S BELIEFS

Missouri asserts the right to exclude an applicant on the basis of its beliefs. Petition, pp. 6a-7a. Missouri candidly admits that the Klan's application was treated differently from the vast majority of applications, Petition p. 5a, and that this disparate treatment is a direct result of Missouri's "perception of the Klan's beliefs." Petition, p. 6a.

MISSOURI'S PURPORTED NONDISCRIMINATION REGULATIONS ARE NOT APPLIED TO ANY OTHER PROGRAM PARTICIPANTS AND ARE THEREFORE, PRETEXTUAL

Missouri alleges that its exclusion of the Klan is justified by the Klan's discriminatory membership policies. Missouri adopted its nondiscrimination regulation in 1995, one year after the Klan applied to the program, to wit: "Applicants must adhere to the restrictions of all state and federal nondiscrimination laws. Specifically, the applicant must not discriminate on the basis of race, religion, color, national origin or disability. Such discrimination disqualifies the applicant." Petition, p.9a. Missouri also cites Executive Order 94-03, Petition, p. 15a and Title VI of the Civil Rights Act of 1964, Petition, p. 13a, as additional motivations for excluding the Klan on the basis of its discriminatory membership policies.

Missouri cannot identify any state or federal nondiscrimination law allegedly violated by the Klan. Missouri concedes that it does not require any other applicant to disclose its membership requirements and that it makes no effort to investigate any other applicant's membership requirements. Petition, p. 16a. Missouri has never denied any other applicant on the basis of discriminatory membership criteria, even though many of the participants currently discriminate in one or more of the prohibited basis, *e.g.*, the Knights of Columbus (sex and religion), the Catholic Church (religion), and the Boy Scouts (sex). Petition, pp.16a, 26a. The Eighth Circuit concluded as a factual matter that Missouri's asserted nondiscrimination "reasons are entirely pretextual." Petition, p. 15a.[1]

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[1]Although it was unnecessary to resolution of the appeal, the Eighth Circuit also held that Missouri's attempt to dictate membership policies to the Klan as a condition of participation in the Adopt-A-Highway

REASONS FOR DENYING THE PETITION

This Court has always followed a policy of strict necessity in reaching constitutional issues. *Rescue Army v. Municipal Court of City of Los Angeles*, 331 U.S. 549, 569, 67 S.Ct. 1409, 1419 (U.S.Cal. 1947). Missouri's Petition rests on the wrongheaded supposition that the Eighth Circuit decided the case solely on a narrow question of law relating to the so-called nondiscrimination provisions. The Court below rejected Missouri's reliance on the purported nondiscrimination reasons as pretextual because Missouri exclusively applied these nondiscrimination provisions to the Klan and not to other similarly situated program participants. The explicit finding that Missouri's nondiscrimination justification is pretextual obviates the need to reach the constitutionality of the asserted justification. The constitutional implications of Missouri's purported nondiscrimination regulations simply do not matter when Missouri either failed to enforce them at all or exercised them in an egregiously discriminatory manner designed to punish the Klan for its exercise of First Amendment freedoms.

Petitioners statement that the "Eighth Circuit's conclusion regarding pretext was based principally on its belief that

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program is a violation of the Klan's First Amendment freedom of association. "The State simply cannot condition participation in its highway adoption program on the manner in which a group exercises its constitutionally protected freedom of association." Petition, p. 12a.

Furthermore, if Missouri has any constitutional claims that survive the Eighth Circuit's findings of pretext, they are completely disposed of by this Court's recent holding in *Boy Scouts of America, et.al v. Dale*, 530 U.S. ___(2000), which rejected attempts by the State to interfere with expressive association by dictating an association's membership requirements. *See*, the Eighth Circuit's finding that "[t]here seems to be little question that requiring the Klan to accept non-'Aryans' would significantly interfere with the Klan's message of racial superiority and segregation." Petition, p. 10a.

there was no 'convincing and constitutional' reason for the denial", Petition, p. 11 (emphasis added), implicitly acknowledges that the Court below relied on findings other than constitutional dissection of their asserted nondiscrimination provisions. Petitioners completely disregard the "non-principal" basis for the Eighth Circuit's ruling; that Missouri's nondiscrimination justification is trumped-up.

Petitioners do not challenge the Eighth Circuit's holding that government may not posit its grace on the relinquishment of constitutionally protected freedoms of speech and association. *Rutan v. Republican Party*, 497 U.S. 62, 67 (1990), citing *Perry v. Sinderman*, 408 U.S. 593, 596-8 (1972). The Eighth Circuit's ruling that Missouri is prohibited from excluding the Klan from the Adopt-A-Highway program in retaliation for its exercise of First Amendment freedoms is a correct application of law to the facts and not in conflict with any other court. Such ruling is wholly independent of the constitutional issues raised by Missouri's petition.

CONCLUSION

Petitioners advance the insidious, but seductive, notion that participation in government programs should be closed to those who are at odds with the prevailing political orthodoxy. The First Amendment has always been the last defense against those who would misuse government power to suppress political dissidents. Petitioners' characterization of these constitutional limitations upon the State of Missouri as "bizarre" and "shocking" serves as a reminder of the eternal need for vigilance in the protection of our constitutional freedoms

This Court should deny petitioners' writ.

Respectfully submitted,

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No. 00-289

Supreme Court, U.S.
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In The

Supreme Court of the United States

J.T. YARNELL, in His Official Capacity as Chief Engineer of the Missouri Department of Transportation, *et al.*,

Petitioners,

v.

CORRECTED COPY

MICHAEL CUFFLEY and the KNIGHTS OF THE KU KLUX KLAN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* VIRGINIA, ARKANSAS, CALIFORNIA, COLORADO, DISTRICT OF COLUMBIA, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MINNESOTA, MISSISSIPPI, MONTANA, NEVADA, NEW YORK, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, VERMONT, WASHINGTON, WEST VIRGINIA, AND WYOMING IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICI CURIAE* VIRGINIA, ARKANSAS, CALIFORNIA, COLORADO, DISTRICT OF COLUMBIA, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MINNESOTA, MISSISSIPPI, MONTANA, NEVADA, NEW YORK, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, VERMONT, WASHINGTON, WEST VIRGINIA, AND WYOMING IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*

The *Amici* are among the States that share the deep concern felt by Missouri at the prospect of being forced to honor the Ku Klux Klan on signs posted by the State along public highways. Each of the *Amici* operates an adopt-a-highway program similar to the one operated by Missouri.[1] Each seeks to promote civic responsibility–and save taxpayer dollars–by recruiting, training and coordinating volunteers to assist in performing an essential governmental function: keeping the roadsides free of trash. Each has chosen to erect signs recognizing the volunteers recruited to perform this task. None have dedicated those signs to the speech *of* those volunteers. Even less have the States dedicated their signs to the speech of organizations that come to the program unbidden and unapproved. Yet, all the States may be deemed to have done so if courts in their own jurisdictions follow the decision of the Eighth Circuit.

The *Amici* are persuaded that the court of appeals has erred and that the Constitution does not require the signs

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[1] Vermont is an exception. It does not operate an adopt-a-highway program, but supports the rights of the States, as described in this brief.

the Klan demands. The issue is of such importance to the *Amici* that they urge the Court to take it up now, rather than leave it to be fought over State-by-State and court-by-court. Protracted litigation on a matter of such obvious sensitivity carries with it the danger of unnecessary societal dissension and loss of public confidence in our institutions of government. For these reasons, the *Amici* respectfully urge the Court to grant the petition for certiorari and to reverse the decision of the court of appeals.

FACTUAL BACKGROUND

There is no need to repeat here the facts of this particular case. They are presented by the petition for writ of certiorari filed by the State of Missouri. The *Amici* do, however, wish to underscore those broader societal facts that continue to cause concern about the Ku Klux Klan, and that make urgent the need to resolve the issues presented by this appeal. "There is little doubt that the Klan's main objective is to establish a racist white government in the United States." *Capitol Square Review and Advisory Bd. v. Pinnette*, 515 U.S. 753, 770 (1995) (Thomas, J., concurring). "There is uncontradicted evidence that violent racism has become the Klan's hallmark and has not subsided to any appreciable extent since the Klan's founding shortly after the Civil War." *McMullen v. Carson*, 754 F.2d 936, 938 (11th Cir. 1985). *Accord, Marshall v. Bramer*, 110 F.R.D. 232, 235 (W.D. Ky. 1985) (taking judicial notice of numerous "cases in which the Ku Klux Klan is identified as a violence-prone group with a history of harassing, intimidating and injuring blacks and members

of other minority groups"), *aff'd*, 828 F.2d 355 (6th Cir. 1987).

As shown by records maintained by the Southern Poverty Law Center, violence, vandalism and intimidation continue to be perpetrated by Klansmen, or in the Klan's name. Recent examples include incidents last year in California, Florida, Maryland, Tennessee and Virginia in which the property of black Americans–including one church–was defaced with the mark, "KKK." Cross burnings were perpetrated in many regions of the country, and a Pennsylvania Klansman was convicted in Virginia for burning a cross with intent to intimidate. Arson, death threats, rape and attempted murder were also traced to Klansmen in several states. *See* Southern Poverty Law Center, *Intelligence Project: Hate Incidents 1999* <http://www.splcenter.org/intelligenceproject/ip-index.html> (visited Sept. 18, 2000).

Against this background, States now face the prospect of being forced to validate the Klan through the erection of highway signs announcing its presence as a partner of government. The *Amici* view such signs as interfering with the right of States to control their own speech, making them implicit apologists for a group opposed to the fundamental principles on which our governments are founded. Even if such signs are viewed as the speech of the Klan, they are nevertheless likely to disrupt the efficiency of government, including the efficiency of the very program that adopt-a-highway signs are intended to promote. Either way, the facts not only support the States in denying signs to the Klan, but underscore the importance of the Court's hearing this appeal.

REASONS FOR GRANTING THE WRIT

Summary

Whose speech is it? This is the fundamental issue in this case. Yet it is an issue which the court of appeals cast aside as irrelevant. The district court also erred; it took up the issue but decided it incorrectly. The speech at issue is found on signs posted by a State in its right-of-way and recognizes organizations that do the State's work. The signs are not the speech of the organizations they recognize. They are the speech of the State, be it Missouri or any of the other forty-seven States that operate similar adopt-a-highway programs. As this Court has repeatedly recognized, government has the right to control its own speech. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995). The First Amendment is not implicated. The Court should hear this case in order to vindicate and further clarify the right of States to engage in speech.

Moreover, even if such a highway sign were the speech of the organization it names, the State should still be free to prevent the Ku Klux Klan from participating in the adopt-a-highway program and/or from announcing itself on the signs that ordinarily accompany such participation. As this Court has recognized, government as employer may impose restraints on the job-related speech of its employees that it could not impose on the public at large. Such restraints are not subject to strict scrutiny but are judged by the balancing test described by this Court in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) and *United States v. National Treasury Employees Union*, 513 U.S.

454 (1995) ("*NTEU*"). When volunteers undertake to perform an essential governmental function under governmental supervision–such as cleaning trash from the roadside–they subject themselves to the same restraints as could be imposed by government on the employees whose tasks they assume. The restraint on speech imposed here by Missouri satisfies the balancing test of *Pickering/NTEU*. The Court should hear this case in order to vindicate and clarify the right of States to use volunteers without surrendering the authority necessary to manage public business efficiently and effectively.

THE HIGHWAY SIGNS AT ISSUE ARE THE SPEECH OF THE STATE.

A State Has A Right To Control Its Own Speech.

The First Amendment protects citizens against governmental interference with their freedom of speech. It is a cherished freedom and one that the courts guard zealously, and rightly so. Yet, in its zeal, the court of appeals has minimized the fact that *government* can also engage in speech. When it does, the content of that message does not implicate free speech guarantees of the First Amendment.

Government speech is commonplace. Sometimes, the purpose of the speech is to advance a governmental goal or policy, such as discouraging teenage drinking, promoting tourism or encouraging use of seatbelts. At other times, the purpose is simply to commemorate some person, place, or event that figures in the public life of the state or nation. When a governor issues a proclamation

recognizing Consumer Protection Week or Agriculture Week in his State, it is government speech. When a State legislature erects a monument to the State's war dead, it is government speech. When the U.S. Postal Service issues commemorative stamps to "Celebrate the Century," it is government speech. When New Hampshire emblazons its license plates with the slogan, "Live Free or Die," it is "the *State's* ideological message" that is displayed. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (emphasis added).

"[W]hen the State is the speaker, it may make content-based choices." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995). The First Amendment "permit[s] the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." *Id.* When government speaks, individuals and groups are free to disagree with what is said, or the way it is said. And, they cannot be made to serve as couriers of the government's message. *See Wooley*, 430 U.S. at 717. They also have a right to change the government's message, if they can, through the democratic process. Yet, they have no right to use a lawsuit to compel the government to change its message or to adopt a message it abhors. The First Amendment confers no such license. *See, Rust v. Sullivan*, 500 U.S. 173 (1991) (rejecting challenge to government regulation limiting expenditure of public funds to family planning message favoring childbirth over abortion). Thus, a State does not violate the First Amendment by controlling its own speech. As the discussion that follows will show, the erection of a highway sign honoring a volunteer organization that has removed litter from the roadside *is* the speech of the

State, and is not subject to compulsion under the First Amendment.

Adopt-A-Highway Signs Are The Speech Of The State.

When a State posts an adopt-a-highway sign honoring an organization that has removed roadside litter – such as the sign sought here by the Klan – the sign contains the speech of the State, not the speech of the organization. This is shown by the following six points:

First, the signs are purchased by the State, posted by the State in the State right-of-way and remain the property of the State. Ownership is key because "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 46 (1983) (quotation marks and citations omitted). Thus, as the owner of the signs, the State has authority to decide whether they will be designed to convey the messages of private citizens, or its own message.

Second, maintaining the highways is a function performed from time out of mind by government as one of its essential duties. Keeping the roadsides clean is part of that function. Whether government performs that function by hiring and supervising employees, or by recruiting and coordinating volunteers, makes no difference. It remains a job for government. Missouri–and most States–now carry out that job, in part, through adopt-a-highway programs. The signs at issue here are part of that program, and hence are part of an essential government function.

Third, a State could conceivably compensate the organizations that pick up litter by giving them a little roadside billboard for whatever message they want to post. Were it so, such billboards would not likely be government speech. But that is not what the States do, and it is certainly not what Missouri has done. Missouri does not simply give billboard space to organizations that pick up litter. Instead, Missouri has maintained control over what will be posted on its signs, thus preserving the messages as its own. This control is shown, for example, by Missouri's decision that its program is "not intended as a means of providing a public forum for the participants to use in promoting name recognition or political causes." MO. CODE REG., tit. 7, § 10-14.030(1). The fact that these regulations were not adopted until after this controversy began is of little consequence. They merely state formally what was already understood.

Fourth, if the Klan were to prevail in this case, the sign that Missouri would be required to post, using its typical sign format, would have the appearance of other informational signs posted by Missouri on its highways. It would say the following:

ADOPT-A-HWY
MI. LITTER CONTROL

KNIGHTS OF THE KU KLUX KLAN
REALM OF MISSOURI

See Bill Dedman, *Klan Gets Wish, But Fight Over Project Continues*, NEW YORK TIMES, Dec. 4, 1999, at A10 (photograph of sign posted by Missouri in response to court order). By its appearance, terms and manner of

erection, such a sign would cast the Missouri Adopt-A-Highway Program as the speaker.

Fifth, even if such a sign were regarded as merely giving *information*, it is a principle of First Amendment jurisprudence that an individual cannot generally be compelled to speak, even to convey facts he does not wish to express. *See generally, Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1, 11 (1986) ("[A]ll speech inherently involves choices of what to say and what to leave unsaid. . . . "); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (upholding right of speakers to make decisions about omissions or additions to content of their own publications). The First Amendment is generally viewed as protecting citizens from the government and not the other way around. Yet, surely free speech principles do not impose upon the people of a State in their collective capacity a compulsion to speak from which they would be insulated as individuals.

Finally, such a sign conveys more than information, or even thanks. It advertises and promotes the State's adopt-a-highway program, a message that belongs to the State. It also implies a message of acceptance, a message that the State regards the Klan as a valuable member of society just like the Rotary Club or the Jaycees who have adopted the next stretch of highway down the road.[2] No

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[2] Such a message of *acceptance* is different from–and more fundamental than–a message of *endorsement*. A State might allow, for example, the Young Republicans to adopt one stretch of highway and the Young Democrats the next, and post signs recognizing each group without endorsing the views of either one. But, by posting such signs, the State would nevertheless

State views the Klan that way. Yet, it is precisely this message of official validation that the Klan seeks from Missouri, and it is for this reason, too, that the speech at issue is the speech of the State. The Court should grant certiorari so as to ensure that neither Missouri nor the other States are compelled to use their speech to legitimize the Klan.

THE KLAN MAY BE DENIED A SIGN UNDER *PICKERING* AND *NTEU*.

The Supreme Court has repeatedly recognized that government "may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large." *United States v. National Treasury Employees Union*, 513 U.S. 454, 465 (1995) ("*NTEU*"). To determine whether a restriction on citizen speech is justified, the Court balances "the interests of the [employees], as . . . citizen[s], in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services." *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). Based on the facts present here–and that would likely be present in other cases involving the Klan–the principles of *Pickering* and *NTEU* afford Missouri and other States broad discretion to deny adopt-a-highway signs to the Klan.

The job of maintaining the highways in general–and the task of litter removal in particular–are essential

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send the message that it views both groups as contributing members of society and within the pale of legitimacy.

government functions. This is so not only because the government has ownership or other control over the highways, but also because the task of litter removal is one for which the free market offers no incentives. States often perform this function through employees; however, recent years have seen the growth of adopt-a-highway programs in which private organizations volunteer to perform this task under the supervision of the State.

Litter removal *employees* are subject to the additional restraints that governments may impose upon the job-related speech of those it hires. So, too, *volunteers* who perform this same function may be similarly restrained. Accordingly, Missouri acted constitutionally when it retained the right to reject an application if "in its opinion, granting the request would jeopardize the program, be counterproductive to its purpose or have undesirable results such as increased litter, vandalism or sign theft." Mo. Code Reg., tit. 7, § 10-14.030(2)(A).

"[S]urely a public employer may, consistently with the First Amendment, prohibit its employees from being 'rude to customers'. . . . " *Waters v. Churchill*, 511 U.S. 661, 673 (1994). Yet it is much more disruptive to have government employees–or volunteers–engage in speech that reveals them to be not simply boors, but racists with a well-established reputation for violence. Thus, if employees hired by the government were to wear Klan garb or hoist a Klan sign while removing trash from the roadside, there is little doubt that the State could prohibit such job-related speech under *Pickering* and *NTEU*. The same is true when the Klan seeks to engage in similar expression while picking up litter as volunteers in a government program. *See, Texas v. Knights of the Ku Klux*

Klan, 58 F.3d 1075, 1079 (5th Cir. 1995) ("presence of Klan members on the highway in Klan attire picking up trash at the entrance to the project would invite strife"). What the Klan here seeks–a permanent sign announcing its presence–may be similarly restricted if a State reasonably concludes that the posting of such a sign is likely to disrupt the efficient delivery of government services.

This Court "ha[s] given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern." *Waters*, 511 U.S. at 673. It is not difficult to see how such disruption would occur here. For example, Klan signs are likely to become targets for litter hurled at them by passers-by wishing to vent their distaste for the Klan. *See* Bill Dedman, *Klan Gets Wish, But Fight Over Project Continues*, NEW YORK TIMES, Dec. 4, 1999, at A10 ("State police officials say they fear that motorists would go out of their way to litter on the Klan's mile of I-55."). Other forms of vandalism and theft are also likely to occur, as this case shows. *See id.* (describing unauthorized removal of two Klan highway signs in Missouri). Moreover, the presence of the Klan on roadside cleanup forays might well incite hostile action by other citizens, thereby resulting in breach of the peace, hazardous driving conditions and/or diversion of law enforcement resources to prevent or respond to such incidents.[3] Participation by

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[3] This is not to say that groups with views repugnant to the majority may be excluded from use of the streets as a traditional public forum for parades or other demonstrations. But, such right is always subject to reasonable time, place and manner regulations; and parade permits are not at issue here. The restraints that government may impose as an employer do not evaporate when the job takes place on the public streets.

the Klan could also diminish the incentive of other groups to participate and could lead governments to conclude that, on balance, the program is not worth pursuing. *See Klan Kept Out of State Road Program*, WASHINGTON POST, Apr. 3, 1999, at B3 (describing decision of Maryland's Anne Arundel County to discontinue its adopt-a-highway program because of the Klan).

Against these very real concerns about the efficiency of public services must be weighed whatever interests the Klan may have in commenting on matters of public concern. *See Pickering*, 391 U.S. at 568. What message would the Klan convey by a sign that starkly announces its presence but says little more? Is the message that even an avowedly racist group can be environmentally sensitive? Such organizational self-promotion is not a matter of public concern. Or is the message that the Klan is in town and that racial minorities had best beware? Such a message of intimidation may be a matter of public *alarm*, but it falls outside the legitimate public discourse that *Pickering* seeks to protect when it uses the phrase, "matters of public concern."

Even if the message conveyed by the work-related highway sign were a "matter of public concern," the denial of such a sign to the Klan would still leave open ample alternative channels of communication. The Klan could still deliver its message through all other lawful means of communication, including any billboards it might rent or lawfully post as a private group. The balancing test defined by *Pickering* and *NTEU* weighs in favor of the State and against the Klan. Thus, even if the

Klan were entitled to participate in picking up litter (an entitlement the *Amici* dispute[4]), it still would have no entitlement under the First Amendment to a State-purchased sign announcing its presence. The Court should hear this case in order to affirm the right of States to apply to the job-related speech of volunteers the same restrictions allowed with respect to the speech of employees.

CONCLUSION

This case is not about the protections afforded by the First Amendment to those who hold unpopular views. This case is about the right of the people–acting through their elected representatives–to engage in their own speech as a body politic. And it is about the right of the people to have a government whose essential operations are not unduly disrupted by the work-related speech of those whom it has recruited to carry out those operations.

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[4] The *Amici* take issue with the Eighth Circuit's conclusion that picking up litter is a form of speech. *See* Pet. App. 4a-5a, n.3. To the extent that any speech element may be involved, it is at most expressive conduct governed by the less demanding test described by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968). Of course, as a practical matter, recognizing the State's right to deny the Klan a sign is likely to blunt the Klan's enthusiasm for assisting government efforts to maintain public highways.

For the foregoing reasons, the *Amici* respectfully urge the Court to grant the writ of certiorari sought by Missouri.

September 22, 2000

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No. 00-289

In the Supreme Court of the United States

J.T. YARNELL, in his official capacity as Chief Engineer of the Missouri Department of Transportation, ET AL.,
Petitioners,

v.

MICHAEL CUFFLEY and the KNIGHTS OF THE KU KLUX KLAN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The Klan's brief in opposition does not take issue with *any* of the submissions in the petition for certiorari. The Klan thus does not deny that the Eighth Circuit's state-action analysis both conflicts with this Court's holdings and contributes to a pervasive confusion in the courts of appeals. The Klan attempts neither to defend the court of appeals' misreading of Title VI nor to deny that the decision below creates intolerable uncertainty regarding federal funding decisions governed by that statute. And the Klan does not suggest that the Eighth Circuit's analysis can be reconciled with the State's interest in determining the content of its own speech.

Instead, the Klan hinges its opposition to certiorari entirely on the proposition that the court of appeals found the State's asserted reasons for denying the Klan's participation in the Adopt-A-Highway program to be "pretextual." The Klan thus maintains that "Missouri asserts the right to exclude an applicant on the basis of its beliefs" (Br. in Opp. 1); that "[t]he Court below rejected Missouri's reliance on the purported nondiscrimination reasons as pretextual" (*id.* at 3); and that this "ruling is wholly independent of the constitutional issues raised by Missouri's petition." *Id.* at 4. The Klan's argument, however, rests on a plain misreading of the court of appeals' holding.

1. In fact, as we explain in the petition (at 11-12), the court of appeals expressly premised its decision on the conclusion that Missouri's stated reasons for denying the Klan's application were unconstitutional — that is, on the holding that there was no "convincing and constitutional reason for the denial." Pet. App. 8a. Declaring that the absence of such a "convincing and constitutional reason" led it to believe "that the State denied the Klan's application based on the Klan's beliefs and advocacy" (*ibid.*), the court proceeded to "discuss the State's [asserted] reasons" for denying the application. *Id.* at 9a. In doing so, the court explicitly considered and rejected

the State's argument that Klan involvement in the Adopt-A-Highway program would constitute state action, "conclud[ing] that this reason for refusing participation * * * constitutes an unconstitutional condition on the Klan's participation." *Id.* at 12a. Similarly, the court discussed at length the submission by both Missouri and the United States that Klan participation would violate Title VI, ultimately holding that "the United States interprets the 'program' at issue too narrowly" (*id.* at 14a) and that "[s]o long as the State does not deny anyone an opportunity to adopt a highway on an improper basis, the State does not violate Title VI." *Id.* at 15a.[1] These conclusions unambiguously disposed of the constitutional issues in the case.

To be sure, having analyzed and resolved the State's arguments on the merits, the court of appeals went on to opine that "[n]ot only do the State's discrimination-related reasons not make sense, but there also is evidence that * * * these * * * reasons are entirely pretextual." Pet. App. 15a. But this brief assertion — appearing in one paragraph appended to the tail-end of the court's lengthy explanation of its legal analysis and conclusions — plainly was intended to support, and not to substitute for, the court's statement of its holding on the merits. Fairly read, there can be no doubt that the court's resolution of the state-action and Title VI issues was meant to be a conclusive disposition of these points, and that this holding will be regarded as binding by future panels of the court of appeals, by other state and local governments in the Eighth Circuit, and

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[1] In contrast, the court disposed of a *different* rationale offered by the State for denial of the Klan's application — that the Klan has a history of criminal violence — on the *sole* ground that "[a]ll of the evidence * * * supports the Klan's contention that this reason is pretextual." Pet. App. 12a. The court did not offer any discussion of the merits of that justification. This contrast in treatment between the criminal violence rationale on the one hand, and the state-action and Title VI rationales on the other, confirms that the court's holding on the state-action and Title VI issues turned on its analysis of the merits.

by the United States in its administration of Title VI.[2] Indeed, given the court's express statement that its finding of improper motive was premised on the absence of "a convincing and constitutional reason for the denial" (Pet. App. 8a), the Klan necessarily is wrong in asserting that the court's views on pretext were "wholly independent" of its constitutional discussion. Br. in Opp. 4.[3]

2. In addition, so far as the issues presented in the petition are concerned, the Klan's discussion of pretext is simply a red herring. Certainly, in most instances the First Amendment obligates States to disregard the ideology of entities that apply to participate in state programs. In circumstances like the ones here, however, the dictates of the state-action doctrine and the

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[2] Thus the *amicus* brief filed in support of the petition by the District of Columbia and 28 States, including four States in the Eighth Circuit.

[3] It might be added parenthetically that the evidence supporting the court's musings on pretext is open to question. Declaring it "common knowledge" that certain highway adopters, such as the Knights of Columbus, have discriminatory membership policies, the court found it suspicious that only the Klan's application was rejected. Pet. App. 16a. But the Klan is the only adopter whose entire reason for being is discrimination against racial minorities; it is not surprising that its application came to the attention of state officials, while those of other organizations that might have been challenged did not. That background hardly shows that the State's asserted reasons for denying the application were pretextual. The court also pointed to testimony by a state official to the effect than an applicant's "beliefs" could be taken into account in singling out the applicant for special scrutiny (*id.* at 7a), but the court ultimately chose not to rest its decision on that evidence because "a justification for further review of an application does not necessarily equate with justification for denial of an application." *Id.* at 8a. In any event, the relevant point for present purposes is that, notwithstanding the court of appeals' mention of pretext, the court's conclusions regarding the legal issues in the case plainly constituted its holding.

provisions of Title VI *required* Missouri to take account of the Klan's policy of racial discrimination by excluding the Klan from the Adopt-A-Highway program.[4] By the same token, the State was under no obligation to maintain an air of ideological neutrality in administering the portions of the program that involved the State's *own* speech; the State has every right to condemn (and, conversely, to withhold praise in the form of highway signs from) groups that seek to foment racial hatred. Although we made these points in the petition (at 11-12 & 24-26), the Klan offers no response.

The Klan also does not deny the importance of obtaining immediate resolution of the issues presented here. As the *amicus* brief submitted by 28 States and the District of Columbia in support of the petition correctly notes, immediate review is essential because "[p]rotracted litigation on a matter of such obvious sensitivity carries with it the danger of unnecessary societal dissension and loss of public confidence in our institutions of government" (Br. 2) — a danger that is compounded by the prospect of States "being forced to validate the Klan through the erection of highway signs announcing its presence as a partner of government." *Id.* at 3. In addition, as we also noted in the petition (at 23), the decision below threatens federal funding decisions, requires States in and outside of the Eighth Circuit to choose between legal liability and the loss of federal highway funds, and may disrupt Adopt-A-Highway programs across the Nation. Again, the Klan makes no response to these points. Because the court of appeals' holding plainly resolved the constitutional issues put before it, because those issues are recurring ones of great practical importance, and because the Klan has not offered any

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[4] For this reason, the Klan cannot be correct in asserting that the court of appeals' statement about pretext is unrelated to its legal analysis; given the nature of the State's asserted bases for denying the Klan's application, the court *could not make a finding of pretext* without first finding that those bases were legally insupportable.

substantial reason for the Court to deny the petition, review of the questions presented here is appropriate.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
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No. 00-289

In the Supreme Court of the United States

J.T. YARNELL, in his official capacity as Chief Engineer of the Missouri Department of Transportation, ET AL.,
Petitioners,

v.

MICHAEL CUFFLEY and the KNIGHTS OF THE KU KLUX KLAN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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PETITIONERS' SUPPLEMENTAL BRIEF

Pursuant to Rule 15.8 of the Rules of this Court, petitioners submit this brief to address the brief filed by the United States on January 19, 2001, in response to the Court's invitation.

In its brief in this case, the United States concludes that the Court *should* grant review to address the question whether Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, required the State of Missouri to deny the Ku Klux Klan's application to participate in the State's Adopt-A-Highway program. The United States persuasively explains that the court of appeals misinterpreted Title VI, issuing an opinion that is inconsistent with the language of the statute, with regulations promulgated pursuant to Title VI that have been in place since 1970, and with this Court's decisions interpreting the statute. U.S. Br. 10-17. The United States also notes that the holding below often will make it impossible to prevent discrimination in programs receiving federal funds, substantially undermining federal and state authority to enforce Title VI. U.S. Br. 8-10, 17-18. And the United States demonstrates that the court of appeals' opinion will both disrupt the administration of federal funding programs and confuse the recipients of federal funds, an outcome that has serious implications for virtually every jurisdiction in the Nation. *Ibid.* For these reasons, we wholeheartedly agree with the United States' conclusion that review by this Court of the decision below is imperative.

Having said that, there is one point on which we take issue with the United States. Its brief suggests that the Court limit the grant of certiorari to the Title VI question. The only justification offered by the United States for limiting the grant of review is that judgment for the State on the Title VI point would make it unnecessary for the Court to resolve the other issues in the case. U.S. Br. 10, 19. We agree, of course, that a decision in the State's favor on Title VI should be dispositive. But that in no way renders it inappropriate for the Court to grant review on the other issues presented in the petition: the

questions whether Klan participation in the Adopt-A-Highway program would constitute state action, and whether the expressive activity involved in the program is that of the State rather than of the program participants.

If the Court were to grant review and rule *against* the State on the meaning of Title VI, Missouri's state-action and government-speech arguments would provide independent grounds on which to reverse the judgment below. Indeed, the United States recognizes that, "if the Klan were determined to be acting as an agent of the State [for Adopt-A-Highway] purposes, * * * the discrimination would violate the Equal Protection Clause." U.S. Br. 15 n.12. Moreover, as we argue in the petition (at 12-17, 24-27), the decision below on both the state-action and government-speech points cannot be reconciled with this Court's holdings, while contributing to pervasive confusion and inconsistent judgments in the courts of appeals. To be sure, resolution of these constitutional questions would be unnecessary if the Court ultimately were to rule for the State on statutory grounds. But that always will be the case when a petition presents both statutory and constitutional claims; that reality does not dictate denial of constitutional questions as a matter of course. Because the United States does not take issue in *any other* respect with the arguments for review of questions 1 and 3 that are presented in the petition, the Court should not limit its grant of certiorari.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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In the Supreme Court of the United States

J.T. YARNELL, CHIEF ENGINEER,
MISSOURI DEPARTMENT OF TRANSPORTATION, ET AL.,
PETITIONERS

v.

MICHAEL CUFFLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether petitioners were required by Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, to deny respondents' application to participate in the Adopt-A-Highway program because respondents would exclude persons on the basis of race, color, and national origin from activities under the Adopt-A-Highway program.

2. Whether petitioners' denial of respondents' application to participate in the Adopt-A-Highway program was unconstitutional.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The United States Department of Transportation, through its Federal Highway Administration, provides federal financial assistance to the Missouri Highway and Transportation Commission (MHTC) for the construction and maintenance of highways. For example, during the MHTC's fiscal year 1993, "approximately thirty-seven percent (37%), or $413 million out of $1,112 million, of the total highway user fees and taxes distributed" to the MHTC "for the maintenance and construction of state highways, were funds that were federally reimbursed." C.A. App. 64. Petitioners are various state officials of the MHTC and the Missouri Department of Transportation.

The MHTC is responsible, under state law, for the maintenance of state highways and, under federal law, for the maintenance of any highways constructed with federal funds, including litter pick-up on highway shoulders. See Mo. Ann. Stat. §§ 227.020, 227.030, 227.210(1) (West 1990); 23 U.S.C. 116 (1994 & Supp. IV 1998); 23 C.F.R. 635.505(a)(3). As one of the means of meeting its obligation to maintain the state highway system, the MHTC operates, through the Missouri Highway and Transportation Department, an "Adopt-A-Highway" (AAH) program, which promotes litter control and reduces the cost to the MHTC of litter abatement.

The AAH program allows volunteers to adopt a particular portion of a state highway on which the volunteers agree to pick up litter. C.A. App. 452-453. The MHTC provides garbage bags, safety vests, and caution flags for volunteers, picks up the bags after they are filled with litter, *ibid.*, and tells volunteers how often they must clean the highway, Pet.

App. 24a. The MHTC erects signs at each end of the adopted segment of highway to identify the highway adopters and strictly limits what it puts on the signs. *Ibid.*

2. On May 31, 1994, respondent Michael Cuffley, as a "Unit Recruiter" of respondent Knights of the Ku Klux Klan, Realm of Missouri (Klan), submitted an application, on behalf of the Klan, to adopt a portion of a state highway under Missouri's AAH program. Pet. App. 19a; C.A. App. 54. The Klan allows only white persons to be Klan members. C.A. App. 228, 351. An applicant must state on the Klan membership application form that he or she is of "non-Jewish, non-Negro, non-Mexican and non-Asian descent." *Id.* at 73. A person who adopts a child who is not white cannot remain a member of the Klan. *Id.* at 349-350. As discussed further below (pp. 12-13, *infra*), if the Klan were allowed to adopt a highway under petitioners' AAH program, nonwhite persons would be excluded from the AAH activities on that stretch of highway because respondent Cuffley testified that he would select five or six people from his den of the Klan to clean up the adopted stretch of highway.

3. a. After the Klan initially filed its AAH application, the MHTC filed suit in the United States District Court for the Eastern District of Missouri, seeking a declaratory judgment that it was not required to grant the Klan's AAH application. On June 11, 1996, the district court granted the Klan summary judgment and held that the MHTC's denial of the Klan's AAH application would unlawfully infringe the Klan's freedom of speech. *Missouri, ex rel., Mo. Highway & Transp. Comm'n* v. *Cuffley*, 927 F. Supp. 1248.

b. On May 7, 1997, the court of appeals vacated the district court judgment and remanded with instructions to dismiss the action for lack of jurisdiction, in part because the case was not ripe due to the MHTC's failure to act on the Klan's AAH application. *Missouri ex rel. Mo. Highway & Transp. Comm'n* v. *Cuffley*, 112 F.3d 1332, 1338.

4. On August 14, 1997, the Missouri Department of Transportation denied the Klan's AAH application. Pet. App. 21a. It provided five reasons for that denial: (1) that the Klan "does not adhere to all state and federal nondiscrimination laws in that it discriminates on the basis of race, religion, color and national origin"; (2) that the Klan "has a history of unlawfully violent and criminal behavior"; (3) that Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, "prohibits [the] Missouri Department of Transportation from conferring a benefit to the Knights of the Ku Klux Klan because of the Knights' discriminatory practices, and granting the application would confer such a benefit in contravention of federal law"; (4) that Missouri Executive Order No. 94-03 (1994) "prohibits state agencies from allowing discriminatory practices on state facilities and prohibits contracting with an organization that discriminates, and, therefore, prohibits the [Klan] from participating in this program"; and (5) that the St. Louis district of the Missouri Department of Transportation "has placed a moratorium on adoptions on interstate highways within the City of St. Louis."[1] C.A. App. 465.

5. Respondents then filed the instant suit in the United States District Court for the Eastern District of Missouri, under 42 U.S.C. 1983, alleging that petitioners' denial of their AAH application violated their rights to equal protection and due process and constituted viewpoint discrimination in violation of the First and Fourteenth Amendments. Pet. App. 21a. On April 13, 1999, the district court entered

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[1] Sometime between December 1994 and April 1997, the St. Louis Metro District of the Missouri Department of Transportation imposed a moratorium on all new AAH adoptions of interstate highways within the city limits of St. Louis. C.A. App. 556-557; Pet. App. 20a.

judgment, granting in part the Klan's motion for summary judgment. *Id.* at 18a-30a.[2]

The district court first ruled that participation in the AAH program constitutes speech protected by the First Amendment, that the speech involved in the AAH program is not the MHTC's speech, and that the MHTC had created the AAH program as a nonpublic forum. Pet. App. 22a-24a. The court then held that petitioners' regulation denying participation in the AAH program to applicants who discriminate on the basis of race, color, or national origin (Mo. Code Regs. Ann. tit. 7, § 10-14.030(2)(B) (1995)) is a reasonable regulation, in light of what it described as the regulation's purpose to avoid placing the MHTC at risk of forfeiting federal funding. Pet. App. 25a. But the court rejected the MHTC's argument that it had denied the application on the ground that the Klan's discriminatory policies violate Title VI, because it concluded that the Klan's activities could not give rise to a violation of Title VI (or of the state regulation or executive order). *Id.* at 25a-26a. It reached this conclusion by reasoning that the Klan does not control access to, and does not itself constitute, a program or activity as defined in Title VI. Because the court found no violation of relevant antidiscrimination law, and rejected petitioners' other state regulatory grounds for denying the application,[3] the court reasoned that the MHTC's rejection of the Klan's application was not based on the State's nondiscrimination policies, but rather was based on the Klan's beliefs, in violation of the First Amendment. *Id.* at 29a.

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[2] The district court rejected respondents' equal protection and due process claims, Pet. App. 21a-22a, and petitioners' collateral estoppel argument, *id.* at 22a n.2.

[3] The district court rejected petitioners' reliance on the regulation (Mo. Code Regs. Ann. tit. 7, § 10-14.030(2)(C) (1995)) that prohibits participation in the AAH program by an applicant with a history of unlawfully violent or criminal behavior, on the ground that the regulation is unreasonably vague. Pet. App. 26a-27a.

With respect to the MHTC's moratorium on AAH adoptions within the city limits of St. Louis, the court found that it constituted a reasonable and viewpoint-neutral regulation, Pet. App. 27a-28a, noting that "[t]he Klan may still adopt a highway in any location within the state not affected by the moratorium." *Id.* at 27a. Accordingly, the court held that the Klan's application to adopt the stretch of highway in St. Louis was properly denied based on the moratorium, but the court enjoined petitioners from denying the Klan's AAH application on the basis of its regulations relating to nondiscrimination and criminal history. *Id.* at 29a.

6. The court of appeals affirmed the judgment in favor of respondents. Pet. App. 1a-17a.[4]

The court concluded that petitioners initially had treated the Klan's application differently "from the vast majority of applicants based on the State's perception of the Klan's beliefs and advocacy." Pet. App. 8a. The court relied on a deposition of a state official that was taken in conjunction with petitioners' declaratory judgment action, *i.e.*, *before* the 1997 order of the court of appeals holding that the case was not ripe due to the State's failure to act on the application and the court's inability to "determine what reasons the State actually will choose to support its denial." 112 F.3d at 1338. The official had testified that the initial referral in 1994 of the Klan's application by an AAH district coordinator to the AAH statewide coordinator was a special situation that had to do with what the Klan believed and advocated.

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[4] The court agreed with the district court's rejection of petitioners' collateral estoppel argument, Pet. App. 4a n.2, and it indicated that the Klan's cross-appeal of the denial of its equal protection claim was resolved by its ruling on the First Amendment claim, *id.* at 4a-5a n.3. The court declined to determine whether the Klan's participation in the AAH program involved constitutionally protected speech by the Klan or whether the AAH program is a public forum, in light of its ruling that the MHTC could not deny access to the AAH program based on the Klan's expressed views. *Ibid.*

Pet. App. 5a-6a. That official believed that the MHTC could deny an AAH application based on the applicant's beliefs. *Id.* at 6a-7a.[5]

The court of appeals acknowledged that "a justification for further review of an application does not necessarily equate with the justification for denial of an application," but the court reasoned that, "absent a convincing and constitutional reason for the denial," the only conclusion left was that the MHTC relied on the same ground to deny the Klan's application, which was unconstitutional. Pet. App. 8a. The court of appeals recognized that the letter denying the Klan's application provided five viewpoint-neutral reasons to support the denial, but the court rejected each of them in turn.[6]

The court of appeals held that the regulation requiring AAH applicants to adhere to state and federal nondiscrimination laws (Mo. Code Regs. Ann. tit. 7, § 10-14.030(2)(B) (1995)) did not justify the denial, because petitioners had not identified any nondiscrimination law that the Klan was violating. Pet. App. 9a-12a.[7] And the court re-

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[5] The court of appeals noted that the state official filed an affidavit in 1998 that maintained that "the State does not consider the beliefs of the applicant, but simply applies Adopt-A-Highway program regulations to determine whether an applicant is eligible to adopt." Pet. App. 7a. That affidavit was filed after the MHTC lost the initial declaratory judgment action in the district court and had promulgated regulations to govern the AAH program. The court refused to credit the affidavit because the court did not believe that the earlier deposition "evinces the kind of mistake and confusion necessary to allow [the] contradictory affidavit to create an issue of fact on these points." *Id.* at 7a-8a.

[6] The court explained that the Klan had amended its AAH application to request adoption of a segment of highway outside the city limits of St. Louis, thereby rendering moot the question of the denial based on the citywide moratorium. Pet. App. 9a.

[7] The court further reasoned that, even if there were a law that required denial of respondents' AAH application on the basis of its discriminatory membership, application of such a law to the Klan would violate the Klan's freedom of political association because "requiring the Klan to accept non-'Aryans' would significantly interfere with the Klan's message of racial superiority and segregation," Pet. App. 10a, and place an

jected petitioners' argument that granting the Klan's AAH application would lead to unlawful discrimination by the State because of its relationship with the Klan. *Id.* at 11a.

The court held that petitioners' reliance on its regulation excluding applicants with a history of unlawfully violent or criminal behavior (Mo. Code Regs. Ann. tit. 7, § 10-14.030(2)(C) (1995)) was pretextual, Pet. App. 12a-13a, because the State did not have any criteria for enforcing the regulation and had never investigated whether any other applicants violated the regulation. *Id.* at 13a.

The court held that allowing the Klan to participate in the AAH program would not violate Title VI. Pet. App. 13a-15a. The court noted that Title VI "does not apply directly to prohibit the Klan's discriminatory membership criteria" because the Klan is not a recipient of federal funds. *Id.* at 14a. The court then concluded that Title VI does not bar petitioners from allowing the Klan to participate in the AAH program. The court concluded that the Klan's adoption of a highway would not mean that others could not clean up along that portion of the highway, *ibid.*, relying on a statement by petitioners' counsel at oral argument that, "subject to safety restrictions, anyone can pick up trash along Missouri highways, including highways adopted by others," *id.* at 11a-12a n.7. The court reasoned that the Klan would simply be a participant in the AAH program and is free to determine its own membership. *Id.* at 15a. So long as petitioners did not deny anyone an opportunity to adopt a highway on an impermissible basis, the court held, "the State does not violate Title VI." *Ibid.*

The court found that the State's Executive Order No. 94-03 does not prohibit allowing the Klan to adopt a highway because the State would not be promoting discrimination or discriminating in offering a service, and because the order

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unconstitutional condition on the Klan's participation in the AAH program, *id.* at 12a.

does not prohibit the Klan from discriminating in its membership. Pet. App. 15a. The court also asserted that petitioners' nondiscrimination-related reasons were pretextual. *Ibid.* The court emphasized that petitioners do not inquire about or investigate the membership criteria of other AAH applicants and have never denied the application of another group on that ground, although AAH participants include organizations whose memberships apparently are restricted on the basis of sex and religion. *Id.* at 16a.

The court ultimately concluded that, in light of the "unreasonable and pretextual reasons" provided by petitioners, the court was "left only with the admitted reason the State was motivated to carefully scrutinize the Klan's application as an explanation for the denial: that the State disagrees with the Klan's beliefs and advocacy." Pet. App. 16a. The court ruled that such viewpoint-based exclusion from a government program is an unconstitutional condition. *Ibid.* (citing *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972)).[8]

DISCUSSION

The petition for a writ of certiorari should be granted, limited to Question 1 as stated in this brief. The court of appeals has narrowly construed Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, in a way that substantially limits the nondiscrimination obligations imposed by that statute on federal fund recipients. That narrow construction not only limits the actions of the MHTC and other federal fund recipients seeking to ensure nondiscrimination under their operations, but also limits the ability of the United States to enforce the statutory ban on discrimination in the operations of federal fund recipients. The court's cramped reading of those obligations is inconsistent with this Court's decisions in *Gebser* v. *Lago Vista Independent*

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[8] Petitioners' petition for rehearing en banc was denied, with two judges voting to grant the petition. Pet. App. 31a.

School District, 524 U.S. 274 (1998), and *Davis* v. *Monroe County Board of Education*, 526 U.S. 629 (1999), and with the plain language and purpose of the statute; it should be corrected in order to permit the statute to serve its intended purpose of ensuring that federal funds are not used in a manner that furthers or subsidizes racial discrimination.

The court of appeals erroneously held that Title VI is not violated so long as the state agency receiving federal financial assistance does not itself deny anyone participation in its covered operations on a racially discriminatory basis. Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. 2000d. That prohibition is violated not only when persons are entirely excluded from a program or activity on the basis of race, color, or national origin, but also when they are subjected to discrimination on such grounds under the program or activity. And this Court has made clear that Title VI is violated not only when a fund recipient directs and intends the exclusion or discrimination, but also when the fund recipient fails to ensure compliance by others with the nondiscrimination requirement under its operations. The MHTC is a state agency that receives federal funds (C.A. App. 64-65), and as such the MHTC must, in all of its operations, including its AAH program, ensure compliance with the nondiscrimination mandate of Title VI and its implementing regulations. 42 U.S.C. 2000d-4a(1)(A). Therefore, Title VI would have been violated if petitioners had granted the Klan's AAH application and the Klan excluded non-white persons from participating in AAH activities on the stretch of highway adopted by the Klan.

The court of appeals' erroneous interpretation of Title VI would prohibit petitioners and the United States from taking action necessary to avoid a Title VI violation. The rationale

of the decision could permit participants in a program receiving federal funds to be subjected to differential treatment within the program on the basis of race, color, or national origin, so long as they were not entirely excluded from the program. Indeed, that rationale would permit such fund recipients to avoid their nondiscrimination obligations by the simple expedient of entrusting the conduct of their operations to third parties and absolving the fund recipients of all responsibility for enforcing a ban on discrimination in those delegated operations. Congress did not write a ban that is so readily evaded. For these reasons, the ruling could substantially undermine enforcement of Title VI. We therefore believe that review by this Court is warranted.

We recommend, however, that the Court's grant of certiorari be limited to the Title VI question. Proper resolution of that question would mean that a lawful, nonspeech-based reason would justify petitioners' denial of respondents' AAH application. Because the court of appeals' analysis of the First Amendment issues was predicated on the erroneous belief that Title VI had no application here, the case should be remanded for reconsideration of the remaining issues in light of a correct interpretation of Title VI.

1. a. Section 601 of Title VI of the Civil Rights Act of 1964, provides that:

> [n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. 2000d. Congress intended that Title VI ensure that "public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination." *Lau* v. *Nichols*, 414 U.S. 563, 569 (1974) (quoting 110 Cong. Rec. 6543 (1964) (statement of Sen. Humphrey, quoting President

Kennedy's message to Congress)); see also *Cannon* v. *University of Chicago*, 441 U.S. 677, 704 & n.36 (1979) ("Title IX, like its model Title VI, sought to * * * avoid the use of federal resources to support discriminatory practices"). For purposes of Title VI, a "program or activity" means "all of the operations of" any "department, agency, * * * or other instrumentality of a State or of a local government," "any part of which is extended Federal financial assistance." 42 U.S.C. 2000d-4a(1)(A).

Under Section 602 of Title VI, federal agencies, such as the United States Department of Transportation, which are "empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract," were directed to issue "rules, regulations, or orders of general applicability," consistent with the objectives of the funding statute to effectuate Section 601's prohibition against discrimination. 42 U.S.C. 2000d-1. In 1970, the Department of Transportation promulgated such regulations, see 49 C.F.R. Pt. 21, which provide, *inter alia*, that a federal fund recipient

> may not, directly or through contractual or other arrangements, on the grounds of race, color, or national origin, * * * [d]eny a person an opportunity to participate in the program through the provision of services or otherwise or *afford him an opportunity to do so which is different from that afforded others under the program.*

49 C.F.R. 21.5(b)(1) (vi) (emphasis added).[9] See also 23 C.F.R. 200.5(p)(1) (Federal Highway Administration's

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[9] The Department of Transportation's 1970 regulations also include the regulation, 49 C.F.R. 21.5(b)(2), which is at issue in *Alexander* v. *Sandoval*, No. 99-1908 (argued Jan. 16, 2001). The parties in this case and the courts below, however, have not relied on that regulation. Moreover, this case does not involve an action to enforce Title VI against petitioners, either by the government or a private party. Therefore, there is no reason to hold this case pending the Court's disposition of *Sandoval*.

Title VI regulations incorporating United States Department of Transportation's Title VI regulations).

b. The MHTC is a state agency that receives federal funds. C.A. App. 64-65 (more than one-third of MHTC's funding for highway maintenance and construction was federal). As such, the MHTC must, in all of its operations, including its AAH program, ensure compliance with the nondiscrimination mandate of Title VI and its implementing regulations. 42 U.S.C. 2000d-4a(1)(A).

2. a. Allowing the Klan to adopt a Missouri highway under petitioner's AAH program would violate Title VI because the Klan, by selecting only its members to participate in AAH activities on its adopted stretch of highway, would be subjecting non-white persons to discrimination based on race, color, and national origin under that program. As an adopter of a highway under petitioners' AAH program, the Klan would have the authority to select the persons who would participate in the AAH activities on the adopted stretch of highway. Respondent Cuffley, the then-highest ranking member of respondent Missouri den of the Klan, testified about how he would exercise his control over selection of the persons to participate in the AAH activities on the Klan's adopted highway segment. Cuffley testified that there were thousands of members in his den of the Klan and, when asked "from what portion of that den would you choose to participate in the Adopt-a-Highway Program if that application were granted," he responded that he thought "we would only need maybe five or six people to clean up a half-mile stretch of a highway." C.A. App. 217. Cuffley testified that he had "no problem with the Highway Department coming down and giving a safety meeting if that's what they want to do." *Id.* at 216. He agreed that, if required by petitioners, the only participants from the Klan in the litter pick-up program would be those individuals who attended a safety meeting conducted by a state highway official. *Ibid.* When questioned about how the Klan would comply with a

requirement that the participants in the litter pick-up program attend such a safety meeting in light of the Klan's claim that the participation of its members in the Klan is confidential, respondent Cuffley testified that he "would pick the people that the Highway Department could give a safety meeting to, if they needed everybody present; yes, I would." *Ibid.*

Because the Klan excludes non-white persons from its membership based on race, color, and national origin (C.A. App. 73, 228, 251; see also *id.* at 349-350), Cuffley's selection of Klan members to perform the AAH activities would mean that non-white persons would, on the basis of race, color, and national origin, be excluded from AAH activities, and be subjected to discrimination, on the Klan's adopted portion of the highway. It would mean that the terms on which a person is allowed to participate in certain of petitioners' AAH activities would be based on race, color, and national origin. Such exclusion by the Klan of persons based on the prohibited grounds from certain AAH activities would subject persons to discrimination under those activities.[10]

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[10] The Department of Transportation's regulations confirm that MHTC's allowing the Klan to adopt a highway under its AAH program would have violated Title VI. Those regulations provide that a federal fund recipient may not, on the grounds of race, color, or national origin, "directly or through contractual or other arrangements," afford a person an opportunity to participate in a program "which is different from that afforded others under the program." 49 C.F.R. 21.5(b)(1)(vi). The AAH agreement which an adopter is required to complete, and which the Klan completed (C.A. App. 54), constitutes a "contractual or other arrangement[]" between the MHTC and the adopter to engage in litter abatement activities on a particular state highway right-of-way—a function that the MHTC would otherwise have to undertake itself in a nondiscriminatory fashion. Yet, under the court of appeals' reasoning, the MHTC was precluded from preventing or stopping discrimination by the Klan under the AAH program. The result would be that the participation of non-white persons in petitioners' AAH program would be limited, based on race, color, and national origin, to certain stretches of state highway. Accordingly, the MHTC would be compelled, through the arrangement and contrary to the regulation, to afford non-white persons, because of their

Contrary to respondent's claim (Br. in Opp. 2-3 n.1), enforcement of Title VI would not require the Klan to alter its membership requirements or its message, and would not, therefore, establish an unconstitutional condition. The Klan, like other participants in the AAH program, would simply be prohibited from engaging in discrimination on the basis of race, color, or national origin in the conduct of its participation in the operations of a program receiving federal financial assistance. Cf. *Rust* v. *Sullivan*, 500 U.S. 173, 196-199 (1991) (explaining this distinction).

b. The fact that the Klan, rather than the federal fund recipient itself, would initially exercise the authority to exclude persons from the AAH activities based on the prohibited grounds does not mean that no Title VI violation would occur. This Court has recognized, in the context of the analogous nondiscrimination provision of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, that a statutory violation under a funding-condition statute like Title VI may be premised on discrimination initiated by someone other than the federal fund recipient. *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).[11] In *Gebser*, the Court held that a recipient school district may be liable in a private action for money damages for the discriminatory conduct of one of its teachers that occurred under its school program, if the district knew about the conduct and was deliberately indifferent to it. The Court based that decision on the express remedial scheme in Title IX (20 U.S.C. 1682), which has a direct parallel in Title VI

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race, color, and national origin, an opportunity to participate in the AAH activities that is "different from that afforded others under the program," contrary to the Department of Transportation's regulation to which deference is due. *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 739-741 (1996).

[11] See *Cannon*, 441 U.S. at 694-696 (explaining that Title IX was patterned after Title VI and that Congress intended that the two statutes be interpreted and applied in similar manner).

(42 U.S.C. 2000d-1), governing federal administrative enforcement of the recipient's nondiscrimination obligations, which can include suspension or termination of funding. That provision requires "notice of the violation 'to the appropriate person' and an opportunity for voluntary compliance before administrative enforcement proceedings can commence." 524 U.S. at 288-290. The Court explained that "[t]he administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation." *Id.* at 290. The Court reasoned that "the implied damages remedy should be fashioned along the same lines," and held that a governmental fund recipient could not be liable in a private action for money damages (which the Court noted could exceed the level of federal funding) unless it has received notice of the violation and responded with deliberate indifference. Thus, *Gebser* demonstrates that, once a recipient is aware of conduct that excludes persons from participation in, denies persons the benefits of, or subjects persons to discrimination under, the recipient's operations, the recipient would be liable for such a violation of Title VI if it failed to take action to stop that discriminatory conduct.

Moreover, a federal fund recipient's responsibilities for supervision of its operations is not limited to its agents. Thus it is no answer to the Title VI argument that the Klan may not be acting as an agent of the MHTC when it engages in the racially discriminatory exclusion of persons from AAH activities.[12] In *Davis* v. *Monroe County Board of Education*, 526 U.S. 629 (1999) (also involving Title IX), the Court held

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[12] Of course, if the Klan were determined to be acting as an agent of the State for these purposes, as petitioners contend (Pet. 12-17), the discrimination would violate the Equal Protection Clause. Correct resolution of the Title VI statutory issue, however, would make it unnecessary to reach that constitutional question.

that a federal fund recipient may be liable under the *Gebser* standard in a private action for money damages to persons who are subjected to discrimination initiated by a non-agent (in *Davis*, a student), so long as the discrimination by the non-agent occurs in a context that is subject to the recipient's control and the recipient fails to respond. *Id.* at 643-644. The Court reasoned that, "whether viewed as 'discrimination' or 'subject[ing]' students to discrimination," Title IX "[u]nquestionably" places on recipients the duty not to permit in their schools sex discrimination that violates the terms of Title IX.

The same reasoning applies here. Title VI unquestionably places on the MHTC the duty not to permit race discrimination by participants, including volunteers (whether agents or non-agents), under any of its operations, including litter pick-up activities on state highway rights-of-way over which the MHTC exercises control and statutory authority. It would violate Title VI's plain terms if the Klan were allowed to perpetrate such discrimination under AAH activities.[13]

Finally, it is no answer to the Title VI argument that non-white persons could seek to adopt a different stretch of Missouri highway under the MHTC's AAH program, because such persons would still be subject to discrimination based on their race, color, or national origin, in the AAH activities occurring on the stretch of highway adopted by the Klan. Allowing a person to participate in a federal fund recipient's operations on terms less advantageous than those afforded to persons of another race constitutes unlawful discrimination under Title VI. Under the court of appeals' ruling, non-white persons would have fewer opportunities to participate in AAH activities, because of their exclusion

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[13] Because this case does not arise out of an action to enforce Title VI or its regulations, the case does not raise questions regarding what standards of notice would have to be met in order to obtain injunctive and/or monetary relief against the federal fund recipient in either an action brought by the federal government or by a private party.

based on prohibited grounds from the AAH activities on the highway adopted by the Klan. It cannot be that Title VI allows, for example, a student to be excluded from a program or activity of a recipient school (or any aspect of that program or activity) based on race, color, or national origin, so long as he or she can participate in all other aspects of the school's programs or activities. Moreover, even if the number of opportunities were the same, the segregation of white persons and non-white persons in AAH activities on particular stretches of highway itself would constitute impermissible race discrimination in violation of Title VI—a statute whose "immediate goal" was "an end to federal funding of 'separate but equal' facilities." *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 416 n.17 (1978) (Stevens, J., concurring in the judgment in part and dissenting in part).[14]

3. The court of appeals' erroneous analysis of Title VI warrants review and correction by this Court.[15] The court of

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[14] According to the court of appeals (Pet. App. 11a-12a n.7), petitioners' counsel suggested that non-white persons could clean along the highway area adopted by the Klan. That suggestion appears inconsistent with petitioners' position that, "if the Klan were granted AAH status, no one other than white, Anglo-Saxon Christians would be permitted to clean up litter on that portion of the highway adopted." C.A. App. 705. In any event, petitioners make each stretch of highway available to only one adopter. See *id.* at 305, 555-556, 574. Thus, if any persons apart from the assigned adopter were permitted to pick up litter on the highway segment adopted by the Klan, they would do so outside the AAH program, *i.e.*, the AAH program would not provide them with clean-up or safety materials, safety training, or a sign, as it does under the program. *Id.* at 54, 452-453. Such persons would therefore still be subjected to discrimination with regard to the AAH activities on the portion of the highway that the Klan adopted.

[15] It is unclear whether the court of appeals' assertion (Pet. App. 15a-16a) that "there is also evidence" that petitioners' "discrimination-related reasons" are "entirely pretextual," was intended as an independent basis for rejecting petitioners' Title VI argument. There is no foundation for the court of appeals' suggestion that the AAH program permits participation of other adopters that "have discriminatory membership criteria" (*id.* at 16a) because the record does not appear to contain evidence regarding membership practices of other adopters, or evidence as to

appeals' rationale is fundamentally at odds with the central purpose of Title VI that public funds "not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination." *Lau*, 414 U.S. at 569 (quoting 110 Cong. Rec. 6543 (1964) (statement of Sen. Humphrey, quoting President Kennedy's message to Congress)). That interest is especially pronounced where, as here, the discrimination would occur in activities that are under the "tight control" (Pet. App. 24a) of a state agency, are closely associated with the agency, involve duties that the agency is required to fulfill, and that would otherwise ordinarily be performed by the agency. The court of appeals' ruling that petitioners could not deny respondents' AAH application in order to prevent discrimination to be perpetuated under programs and activities that receive federal funds may adversely affect the federal government's (and private parties') ability to enforce Title VI and may confuse recipients and participants as to their respective obligations and rights. Although there is not an existing disagreement among the Circuits on the issue, it is clear, in light of the brief filed by more than 25 States as *amici curiae* in support of petitioners, that resolution of this issue would be of great significance to numerous jurisdictions. In light of the importance of Title VI's nondiscrimination mandate and the erroneous interpretation by the court of appeals of that mandate, the Title VI issue presented by this case should be resolved promptly.

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whether they select only their members to participate in AAH activities. Title VI (and 23 U.S.C. 324, which prohibits discrimination on the basis of sex in federally assisted highway programs) apply equally, of course, with regard to discrimination on prohibited grounds by all AAH adopters under petitioners' AAH program or its activities. In any event, any finding by the court of appeals that petitioners' reliance on Title VI was pretextual was premised in part on that court's incorrect view that the Title VI argument was without merit. Thus, any finding it may have made on that argument is not entitled to deference. See *Schneiderman* v. *United States*, 320 U.S. 118, 129-130 (1943).

We do not believe, however, that review of the other issues presented in this case would be appropriate at this time.[16] In light of the fact that Title VI would be violated by petitioners allowing the Klan to discriminate against participants in AAH activities on a highway the Klan adopts, the lower courts should be afforded an opportunity to reassess the case. For example, such a viewpoint-neutral basis for denial of an AAH application bears on the analysis of respondents' First Amendment claims and may render it unnecessary for a court to resolve such constitutional questions. See *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 284-287 (1977) (if employer had two motives for terminating employee and one reason was lawful but other was improperly based on constitutionally protected conduct, employee could not prevail if the lawful reason standing alone would have sufficed to justify the termination); cf. *Board of County Comm'rs, Wabaunsee County* v. *Umbehr*, 518 U.S. 668, 685 (1996) (applying *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968), and holding that, even if contractor makes showing that termination of its government contract was based on its speech on a matter of public concern, government has a valid defense if it shows that it would have terminated the contract regardless of the speech); see also Br. of *Amici Curiae* Virginia and 28 other States, in Supp. of Pet'rs. 10-15. The resultant Title VI violation also is relevant to any remedy ordered. *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 359-362 (1995) (evidence justifying termination of employee that was discovered after employee was actually terminated can limit damages award in age discrimination suit brought by

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[16] In our view, the lower court rulings on other issues were mistaken in several respects. For example, petitioners' AAH program does not constitute a public forum or involve speech by highway adopters, nor would enforcement of Title VI's nondiscrimination mandate under the operations of petitioners' AAH program unconstitutionally interfere with respondents' associational rights.

employee and such evidence generally renders reinstatement and front pay inappropriate: "It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds.").

CONCLUSION

The petition for a writ of certiorari should be granted limited to Question 1 as stated in this brief regarding Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*

Respectfully submitted.

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